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The Inmate Export Business and Other Financial Adventures: Correctional Policies for Times of Austerity

Hadar Aviram

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The Inmate Export Business and Other Financial Adventures: Correctional Policies for Times of Austerity

HADAR AVIRAM*

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Introduction

On August 27, 2013, Governor Jerry Brown announced his new plan for solving the California prison crisis: The state would invest \$315 million of its reserves in private prisons, on California soil and out of state.¹ This plan, promptly approved by the State Assembly,² would enable the state to avoid releasing 10,000 inmates, which is the remaining number of releases required by a federal court population reduction order.³ “Public safety is the priority, and we’ll take care of it,” the governor was quoted as saying,⁴ “[t]he money is there.”⁵

This is the last in a series of moves and countermoves made by California in an effort to comply with the letter, but circumvent the spirit of *Coleman v. Schwarzenegger*,⁶ a 2009 order by a federal three-judge panel requiring that the state reduce its prison population to 137.5% capacity.⁷ This population reduction was mandated in order to improve the abysmal health care provided to inmates, which the panel found to be causally linked to prison overcrowding.⁸ The state vowed to appeal the order, but a five-to-four majority of Supreme Court Justices affirmed it in *Brown v. Plata*.⁹

Even before the Supreme Court decision, the Schwarzenegger administration (in which Governor Brown was Attorney General) was hard at work trying to find solutions to prison overcrowding and its devastating budgetary impact.¹⁰ In 2009, a year after the financial crisis hit private businesses and state and local government, the average yearly cost of incarceration was \$47,000 per inmate.¹¹ Some ideas for mitigating these costs advocated by the Schwarzenegger administration, such as housing

1. Don Thompson, *California Governor Proposes \$315M Prison Fix*, YAHOO! NEWS (Aug. 27, 2013), <http://news.yahoo.com/california-governor-proposes-315m-prison-fix-212715959.html> (last visited Sept. 27, 2013).

2. Patrick McGreevy, *Gov. Jerry Brown's Prison Plan Clears Assembly Committee*, L.A. TIMES (Aug. 29, 2013), <http://www.latimes.com/local/la-me-prisons-20130830,0,2162429.story> (last visited Sept. 27, 2013).

3. *Id.*

4. Thompson, *supra* note 1.

5. *Id.*

6. See *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 962 (2009) (this case consolidated two cases: *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 131814 (N.D. Cal. Aug. 4, 2009) and *Plata v. Schwarzenegger*, 590 F.3d 976 (2009)).

7. *Id.*

8. *Id.*

9. *Brown v. Plata*, 131 S. Ct. 1910, 1944 (2011).

10. Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV., 165, 175 (2013).

11. Legislative Analyst's Office, *California's Annual Costs to Incarcerate an Inmate in Prison, 2008-2009*, http://www.lao.ca.gov/laoapp/laomenus/sections/crim_justice/6_cj_inmate_cost.aspx?catid=3 (last visited Sept. 27, 2013).

inmates in Mexico,¹² were the subject of downright mockery.¹³ Yet, some were more realistic, such as the idea to “downgrade” several offenses and try them as misdemeanors, so that inmates would serve their time in county jails in lieu of state prisons.¹⁴ The plan was submitted to the legislature,¹⁵ approved by the Senate,¹⁶ and then gutted by the Assembly.¹⁷ However, a later reincarnation of the plan, implemented during Governor Brown’s tenure, became known as the Criminal Justice Realignment.¹⁸ The plan was an amalgam of legislative pieces shifting responsibility for tens of thousands of inmates from state prisons and parole offices to county jails and probation offices¹⁹ and has been referred to as “the largest criminal justice experiment ever conducted in America.”²⁰

California’s erratic recurrence to jurisdiction changes, inmate transfers, in-state privatization, and out-of-state incarceration moves, draws attention because of the size of its prison population, but it is hardly unique. The financial crisis has thrown many state and local governments into turmoil, requiring them to rethink their costly correctional policies. In some ways, the crisis has had a salutary effect on incarceration in the United States. According to the Bureau of Justice Statistics, 2009 was the first in 37 years in which the overall U.S. prison population has declined, and the trend has continued through 2012.²¹ The financial crisis has also enabled lawmakers and politicians to support nonpunitive policies, such as the abolition of the

12. Wyatt Buchanan, *Governor Looks South of the Border for Prisons*, S.F. CHRON. (Jan. 26, 2010, 4:00 AM), <http://www.sfgate.com/news/article/Governor-looks-south-of-the-border-for-prisons-3274745.php> (last visited Sept. 27, 2013).

13. John Diaz, *Have the Governor's Senses Headed South?*, S.F. CHRON. (Jan. 27, 2010, 4:00 AM), <http://www.sfgate.com/opinion/article/Have-the-governor-s-senses-headed-south-3274710.php> (last visited Aug. 28, 2013).

14. Molly Hennessy-Fiske & Richard Winton, *Bid to Divert California Prisoners to County Jails Denounced*, L.A. TIMES (May 23, 2009), <http://articles.latimes.com/2009/may/23/local/me-jails23> (last visited Aug. 28, 2013).

15. Michael Rothfield, *Vote on Prison Plan in California Budget is Delayed*, L.A. TIMES (July 23, 2009), <http://www.latimes.com/news/local/la-me-budget23-2009jul23,0,7093912.story> (last visited Aug. 28, 2013).

16. Matthew Yi & Wyatt Buchanan, *Plan to Free State Prison Inmates Moves Ahead*, S.F. CHRON. (Aug. 21, 2009), <http://www.sfgate.com/news/article/Plan-to-free-state-prison-inmates-moves-ahead-3219630.php> (last visited Aug. 28, 2013).

17. Matthew Yi, *Prison Bill Gutted by State Assembly*, S.F. CHRON. (Aug. 28, 2009), <http://www.sfgate.com/bayarea/article/Prison-bill-gutted-by-state-Assembly-3288123.php> (last visited Aug. 28, 2013).

18. Schlanger, *supra* note 10, at 185.

19. *Id.*

20. Tim Stelloh, *California's Great Prison Experiment*, THE NATION (June 5, 2013), <http://www.thenation.com/article/174680/californias-great-prison-experiment#axzz2dH8EZ69x> (last visited Sept. 27, 2013).

21. *U.S. Prison Population Declined for Third Consecutive Year During 2012*, Bureau of Justice Statistics, U.S. Dep’t of Justice (July 25, 2013), <http://www.bjs.gov/content/pub/press/p12acpr.cfm> (last visited Sept. 27, 2013).

death penalty²² and the legalization of marijuana,²³ on the basis of financial prudence without appearing “soft on crime.”²⁴

However, the policies and practices on the ground have been less decisive against punitivism. States in dire economic straits have been experimenting with increased and decreased privatization of their institutions, rolling incarceration costs onto the inmates’ shoulders, shipping inmates to mostly private, out-of-state institutions, making jurisdictional reform and juggling state and county responsibilities for incarceration, and bartering and repurposing prisons for closure. Far from a decisive pendulum swing away from the punitive trend of the forty years that preceded the crisis, these practices are an inconsistent stream of ill-directed emergency efforts, unaccompanied.

This article provides a survey and a critical assessment of these developments. Part I discusses developments in prison privatization and shows how the private prison industry has adjusted to the financial crisis by amending its contracts with state governments and by opening up a new market: detention for undocumented immigrants. Part II addresses the growing tendency to roll some of the incarceration costs onto the inmates themselves, sometimes by charging them for their jail time and sometimes by offering special services for an added sum. Part III examines prison closures and their mixed impact on prisoner welfare, as well as the efforts to repurpose and efficiently utilize institutions of changing designations. Part IV looks at inmate geographical migration, focusing on how states and private prison providers import and export live bodies using empty beds as a bargaining tool. Part V takes a look at realignment and other jurisdictional changes, focusing on the displacement effect of shifting incarceration costs from the state to the county level. We conclude by offering some thoughts on some wiser choices in times of austerity, such as sentencing reforms, in-prison rehabilitation programs, and investment in reentry.

22. Hadar Aviram & Ryan Newby, *Death Row Economics: The Rise of Fiscally Prudent Anti-Death Penalty Activism*, 28(1) A.B.A. CRIM. JUST. 33 (2013), available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/sp13_death_row_economics.authcheckdam.pdf (last visited Aug. 28, 2013).

23. Caroline Fairchild, *Legalizing Marijuana Would Generate Billions in Additional Tax Revenue Annually*, THE HUFFINGTON POST (Apr. 20, 2013), http://www.huffingtonpost.com/2013/04/20/legalizing-marijuana-tax-revenue_n_3102003.html (last accessed Aug. 28, 2013). See also Allison DeFoor, *Florida Can Save Money, Reduce Crime, Salvage Lives*, THE JOURNAL OF THE JAMES MADISON INSTITUTE, Spring/Summer 2009, 54-58, available at <http://www.jamesmadison.org/wp-content/uploads/pdf/materials/684.pdf>, (last visited Sept. 27, 2013) (conservative politicians are calling for an end on the War on Drugs for fiscal reasons).

24. Aviram & Newby, *supra* note 22.

I. Inside the Belly of the Beast: Private Prison Providers and the Financial Crisis

A. Private Providers Adaptation Techniques

No explanation of recession-era prison policies is complete without understanding the complex interactions between state and local governments and private prison providers, which explains much (albeit not all) of the prison construction growth since the 1960s. The end of the 20th century and first decade of the 21st century saw a seismic shift in the privatization of state prisons across the United States.²⁵ Unable to shoulder the burden placed on their taxpayers and treasuries, financially-strapped states housing record numbers of prisoners have increasingly turned to privatizing their prison facilities as an ostensibly cost-saving measure.²⁶ As of 2010, private prisons accounted for 80% of the entire national prison population, housing “128,195 of the 1.6 million state and federal prisoners in the United States.”²⁷ Overall, the years between 1999 and 2010 marked an 80% increase in the number of prisoners held in private prisons, versus an 18% increase in prisoners overall.²⁸ The prison system has borne the brunt of this increase in prison privatization over the first decade of the 21st century, with a rise in the number of federal prisoners in private prisons “from 3,828 to 33,830, an increase of 784%.”²⁹ By contrast, “the number of state prisoners incarcerated privately grew by 40% from 67,380 to 94,365.”³⁰

Overall, 30 states now employ private prisons in housing inmates to some degree.³¹ Across the individual states, the numbers of inmates who have been placed into and removed from private prisons has fluctuated wildly. For example, between 1999-2010, Florida and Idaho saw an increase in the percentage of inmates in private facilities of 213% and 459%, respectively, while Arkansas, Michigan, Minnesota, Maine, Utah, Washington, and Nevada each saw a 100% decrease as they removed all of their inmates from private prisons.³² Six states currently hold at least ¼ of their inmates in private prisons, including Alaska, Montana, New Mexico, Hawaii, Vermont, and Idaho.³³ As of 2010, Texas led in number of inmates

25. Cody Mason, *Too Good to be True: Private Prisons in America*, THE SENT’G PROJECT, 1 (Jan. 2012), http://sentencingproject.org/doc/publications/inc_Too_Good_to_be_True.pdf.

26. *Id.*

27. *Id.* at 4–5.

28. *Id.* at 1.

29. *Id.* at 1.

30. *Id.*

31. *Id.* at 4–5.

32. *Id.*

33. *Id.*

incarcerated privately, with 19,155 inmates held in private prisons, followed by Florida, with 11,796 inmates held in private prisons.³⁴

The biggest private prison provider in the United States is the Corrections Corporation of America (CCA),³⁵ a publicly traded company incorporated in the state of Maryland.³⁶ As of September 30, 2012, CCA operated 67 correctional facilities³⁷ and owned 49 facilities³⁸ located in 20

34. *Too Good to be True*, *supra* note 25 at 4–5.

35. Financial Tear Sheet, CORR. CORP. OF AM. 1, available at <http://ir.correctionscorp.com/Tearsheet.ashx?c=117983> (last accessed Oct. 14, 2013).

36. See generally Investor FAQs, CORR. CORP. OF AM., <http://ir.correctionscorp.com/phoenix.zhtml?c=117983&p=irol-faq> (last visited Oct. 12, 2013). CCA had its initial public offering in October of 1986, issuing 2 million shares at \$9.00 per share.

See also Prison Realty Trust, Inc., Annual Report (Form 10-K) (Dec. 31, 1999), available at <http://www.sec.gov/Archives/edgar/data/1070985/0000950144-00-004324.txt>. In 1999, CCA's Tennessee predecessor merged with Prison Realty Trust, a Maryland Real Estate Investment Trust, to form the current iteration of CCA.

Investor FAQs, CORR. CORP. OF AM., <http://ir.correctionscorp.com/phoenix.zhtml?c=117983&p=irol-faq> (last visited Oct. 12, 2013). The company initially sought to retain REIT status to take advantage of tax benefits, but in October 2000 it reorganized into a traditional C-corporation.

See also Corr. Corp. of Am., Quarterly Report (Form 10-Q), available at http://www.sec.gov/Archives/edgar/data/1070985/000119312512459397/d420784d10q.htm#toc420784_9. As of September, 2012, CCA is investigating options to convert back to a REIT and, pending a favorable ruling from the IRS, hopes to make the conversion in January of 2013.

Alex Panes, *Are For-Profit Prisons Ready to Break Out After Reaching New Highs?*, THE MOTLEY FOOL (Sept. 7, 2012), <http://www.fool.com/investing/general/2012/09/07/are-for-profit-prisons-ready-to-break-out-after-r.aspx>. CCA projects that the switch would reduce their cost of capital, facilitate expansion, and attract more shareholders.

37. There are 20 facilities that CCA operates but does not own: Bartlett State Jail, Bay Correctional Facility, Bradshaw State Jail, Citrus County Detention Facility, Dawson State Jail, Elizabeth Detention Center, Graceville Correctional Facility, Hardeman County Correctional Center, Idaho Correctional Center, Lake City Correctional Facility, Lindsey State Jail, Marion County Jail II, Metro-Davidson County Detention Facility, Moore Haven Correctional Facility, North Georgia Detention Center, Silverdale Detention Facilities, South Central Correctional Center, Wilkinson County Correctional Facility, Willacy County State Jail, and Winn Correctional Center.

38. Corr. Corp. of Am., Quarterly Report (Form 10-Q) at 6. There are 41 facilities for which CCA is the owner and the operator: Adams County Correctional Center, Bent County Correctional Facility, Bridgeport Pre-Parole Transfer Facility, California City Correctional Center, Central Arizona Detention Center, Cibola County Correctional Center, Cimarron Correctional Facility, Coffee Correctional Facility, Correctional Treatment Facility, Crossroads Correctional Facility, Crowley County Correctional Facility, Davis Correctional Facility, Eden Detention Center, Eloy Detention Center, Florence Correctional Center, Houston Processing Center, Jenkins Correctional Center, Kit Carson Correctional Center, La Palma Correctional Center, Lake Erie Correctional Institution, Laredo Processing Center, Leavenworth Detention Center, Lee Adjustment Center, Marion Adjustment Center, McRae Correctional Facility, Mineral-Wells Pre-Parole Transfer Facility, Nevada Southern Detention Center, New Mexico Women's Correctional Facility, North Fork Correctional Facility, Northeast Ohio Correctional Center, Red Rock Correctional Facility, Saguaro Correctional Center, San Diego Correctional Facility, Stewart Detention Center, T. Don Hutto Residential Center, Tallahatchie County Correctional Facility, Torrance County Detention

states and the District of Columbia.³⁹ According to the CCA:

The Company is compensated for operating and managing facilities at an inmate per diem rate based upon actual or minimum guaranteed occupancy levels. Occupancy rates for a particular facility are typically low when first opened or immediately following an expansion. However, beyond the start-up period, which typically ranges from 90 to 180 days, the occupancy rate tends to stabilize. During 2011, the average compensated occupancy of its facilities, based on rated capacity, was 88.2% for all of the facilities it owned or managed, exclusive of facilities where operations have been discontinued. . . As of December 31, 2011, the Company had approximately 12,300 unoccupied beds at facilities that had availability of 100 or more beds.⁴⁰

In order to understand how CCA and other private prison providers have adapted to the financial crisis, it is useful to explicate their business model. Because CCA is compensated based on a price per-inmate-per-bed-day, CCA monitors a number of per diem values.⁴¹ A distinction is made between the per diems for those facilities which CCA both owns and operates, and those facilities which it only manages.⁴² CCA's latest quarterly disclosure to the SEC compares per diems for June—September of 2011 and 2012, as well as for the 9-month periods of January—September of 2011 and 2012. Additionally, CCA's most recent annual disclosure compares these figures for the fiscal years ending in 2011 and 2012, respectively.⁴³

Facility, Webb County Detention Center, West Tennessee Detention Facility, Wheeler Correctional Facility, and Whiteville Correctional Facility.

39. *Id.* at 8 and 24-25. CCA owns the Community Education Partners, which it also leased but is currently idle. Diamondback Correctional Facility, Huerfano County Correctional Center, Otter Creek Correctional Center, Prairie Correctional Facility, Queensgate Correctional Facility, Shelby Training Center are all also owned by CCA and currently idle. The total number of owned, managed, and leased facilities is 69. *See also* Prison Realty Trust, Inc., Annual Report (Form 10-K), *supra* note 36, at 42. The CCA also owns Leo Chesney Correctional Center, which it leases to another operator.

40. Stock Profile for Corr. Corp. of Am., REUTERS, <http://www.reuters.com/finance/stocks/companyProfile?rpc=66&symbol=CXW> (last visited Oct. 12, 2013).

41. Corr. Corp. of Am., Quarterly Report (Form 10-Q), *supra* note 36.

42. *Id.* at 32-33. As the quarterly report explains, per diems are generally higher for owned and managed facilities because CCA incurs the cost of investment in the facility, repairs, real estate taxes, insurance, and assumes the risk of continuing to pay these costs even if the management contract is terminated and the facility sits vacant.

43. *Id.*; *see also* Corr. Corp. of Am., Annual Report (Form 10-K) (Dec. 31, 2011), *available at* <http://www.sec.gov/Archives/edgar/data/1070985/000119312512081122/d231839d10k.htm>. The data in the table are pulled from Form 10-Q and Form 10-K.

		06/12 – 09/12	06/11 – 09/11	01/12 – 09/12	01/11 – 09/11	FY 2011	FY 2010
Combined Per Diem Averages, All Facilities	Revenue	\$59.19	\$58.62	\$59.16	\$58.76	\$58.48	\$58.36
	Expenses	\$41.34	\$40.51	\$41.83	\$40.20	\$40.15	\$40.16
	Operating Margin	\$17.85 (30.2%)	\$18.11 (30.9%)	\$17.33 (29.3%)	\$18.56 (31.6%)	\$18.33 (31.3%)	\$18.20 (31.2%)
Owned and Managed Facilities	Revenue	\$67.25	\$66.51	\$67.22	\$66.54	\$66.68	\$66.30
	Expenses	\$44.06	\$42.83	\$33.91	\$42.50	\$42.47	\$42.48
	Operating Margin	\$23.19 (34.5%)	\$23.68 (35.6%)	\$22.77 (33.9%)	\$24.04 (36.1%)	\$24.21 (36.3%)	\$23.82 (35.9%)
Managed Only Facilities	Revenue	\$40.30	\$40.70	\$40.22	\$40.93	\$40.39	\$39.60
	Expenses	\$34.98	\$35.22	\$35.66	\$34.93	\$35.05	\$34.69
	Operating Margin	\$5.32 (13.2%)	\$5.48 (13.5%)	\$4.56 (11.3%)	\$6.00 (14.7%)	\$5.34 (13.2%)	\$4.91 (12.4%)

For the nine months ending in September 2012, CCA's net income was \$111.4 million, compared to \$122 million for the nine months ending in September 2011.⁴⁴ For the entire year of 2011, CCA's net income was \$162.5 million, compared to \$157.2 million in 2010.⁴⁵

Contributing to the increase in net income for 2011 compared to the previous year was an increase in operating income of \$9.0 million, from \$323.1 million during 2010 to \$332.1 million during 2011 as a result of an increase in average daily inmate populations and new management contracts, partially offset by an increase in general and administrative expenses and depreciation and amortization.⁴⁶

The private prison business, complete with construction, new contracts, and some changes to existing contracts, has continued to trudge

44. Corr. Corp. of Am., Quarterly Report (Form 10-Q), *supra* note 36, at 28.

45. Corr. Corp. of Am., Annual Report (Form 10-K), *supra* note 43, at 46.

46. *Id.*

along, to a considerable degree of success, deep into the recession and the CCA has been particularly fortunate. The quarterly data reveal a continuing story of growth throughout the local government crisis.

Corrections Corporation of America: Ten-year History of Net Income and Facility Composition

FY ending Dec. 31	Net Income	No. facilities Owned and Managed	No. Managed Only	No. Leased to Third Party Operators
2011	\$162,510	46	20	2
2010	\$157,193	45	21	2
2009	\$154,954	44	21	2
2008	\$ 150,941	43	20	3
2007	\$133,373	41	24	3

*all information taken from the respective fiscal years' 10-Ks, which can be found at: <http://www.sec.gov/cgi-bin/browseedgar?company=&match=&CIK=cxw&filenum=&State=&Country=&SIC=&owner=exclude&Find=Find+Companies&action=getcompany>.

CCA continues to do well in other ways. Compensation for its executives, both in basic compensation and stock options, is impressive,⁴⁷

47. See generally Corr. Corp. of Am. Executive Compensation, MORNINGSTAR, <http://insiders.morningstar.com/trading/executive-compensation.action?t=CXW> (last visited Oct. 12, 2013). Publicly traded companies are required to disclose the amount and type of compensation paid to the CEO, CFO and the three other highest-compensated officers. For the fiscal year ending on December 31, 2011, CCA's CEO and President, Damon T. Hininger, was paid \$3,696,798 in basic compensation. Special Assistant to the CEO, Richard P. Seiter, received the second highest basic compensation package at \$1,845,566. Richard P. Seiter, FORBES, <http://www.forbes.com/profile/richard-p-seiter/> John D. Ferguson, Chairman of the Board and former CEO, was paid \$1,734,793 in basic compensation and \$1,242,172 in stock options. Anthony L. Grande, Executive Vice President and Chief Development Officer received \$1,735,039 in basic compensation and \$31,550 in stock options. Brian Collins, Executive Vice President and Chief Human Resources Officer, received \$1,505,146 in basic compensation and \$1,000 in stock options. In sum, in 2011, the executive compensation (exclusive of stock options) of all of the above-listed executive officers totaled \$12,352,390 as compared to the previous fiscal year ending December 31, 2010, when the same officials received total basic compensation of \$10,861,830, 2011 saw a 13.72% increase in executive compensation. See also Corr. Corp. of Am. Executive Compensation, REUTERS, <http://www.reuters.com/finance/stocks/company>

and its stock is slightly less risky than the industry average.⁴⁸ This continuing success raises the question of how CCA and other prison providers have adapted to the changes in incarceration nationwide.

A partial answer is in CCA's quarterly and annual SEC filings, which go into a fair amount of detail about the development of new facilities, idling of vacant facilities, and changes in customer contracts. The following is a chronological list of recent major facilities changes.

<u>Date</u>	<u>Development</u>
February 2008-March 2009	Begin and suspend construction on Trousdale County, TN facility "until there is greater clarity around the timing of future bed absorption by its customers." ⁴⁹
2009-2013	California accounted for 13% of CCA's management revenue in 2010 and 2011, however the implementation of the realignment program may impact an Intent to Award CCA a contract to house up to 3,256 additional inmates. ⁵⁰
January 2010	Completion of removal of WA and MN inmates from Prairie facility due to low occupancy and in-state space. CCA in negotiations with CA to fill beds. ⁵¹
March 2010	Completion of removal of AZ inmates due to budgetary concerns from Huerfano facility in CO and the subsequent idling of that facility. ⁵²
May 2010	Completion of removal of AZ inmates due to budgetary concerns from Diamondback facility in OK and the subsequent idling of that

Officers?symbol=CXW (last visited Oct. 12, 2013) (reporting that CCA's CFO, Todd J. Mullenger, was paid \$1,835,048 in basic compensation, plus \$58,201 in stock options).

48. Corr. Corp. of Am. Historical Stock Prices, GOOGLE, <https://www.google.com/finance/historical?q=NYSE%3ACXW&ei=ecg-UpD6G6KeiQKjyQE&start=210&num=30> (last visited Oct. 12, 2013). As of the close of the market on November 9, 2012, CCA Stock (trading on NYSE under ticker symbol CXW) was trading at \$33.67/share. With 100.05 million shares outstanding, the market cap of CCA (its number of shares outstanding multiplied by price of share) sits at 3.37 billion dollars. See also CORR. CORP. OF AM., *Investor's FAQs*, *supra* note 36. CCA pays a quarterly dividend of \$.20/share. CCA's beta, which is a measure of the volatility of the stock relative to a market average, is .94. See Corr. Corp. of Am. Financial Highlights, REUTERS, <http://www.reuters.com/finance/stocks/financialHighlights?symbol=CXW> (last visited Oct. 12, 2013) (a beta of 1 means that the stock has average risk. CCA's stock is considered very slightly less risky than market, but more risky than the "industry average" beta of .74).

49. Corr. Corp. of Am., Annual Report (Form 10-K), *supra* note 43, at F-16.

50. *Id.* at 52.

51. *Id.* at 51.

52. *Id.*

	facility. ⁵³
May 2010	Increase in inmate populations at two expanded facilities in GA, Coffee and Wheeler. ⁵⁴
June—September 2010	CCA ceased managing the Gadsden and Hernando County facilities in FL but commenced managing the Graceville and Moore Haven facilities in FL, contributing to a management-only revenue increase of \$28.3 million in 2011. ⁵⁵
June—September 2010	Completion of Nevada Southern Facility. ⁵⁶
June—September 2010	Decrease in FBOP population at California City Facility. ⁵⁷
September 2011	Renegotiate Elizabeth, NJ contract with ICE. New classification system for inmates, lower per diems, 95% occupancy guarantee. ⁵⁸
October 2011	Contract with BOP to house federal inmates at McRae facility in GA, reduced margin but 90% occupancy guarantee and long-term contract up to 10 years. ⁵⁹
November 2011	Closure of Delta 1,172-bed facility in Mississippi. ⁶⁰
December 2011	Purchase of Lake Erie Facility from Ohio for 73 million. ⁶¹
December 2011	44 million investment in property for construction of a facility in San Diego to house federal inmates to replace current San Diego Facility, which will revert to County of San Diego in 2015. ⁶²
January—June 2012	New contract with Puerto Rico to manage up to 480 inmates at Cimarron facility in Oklahoma. ⁶³

53. Corr. Corp. of Am., Annual Report (Form 10-K), *supra* note 43, at 51.

54. *Id.* at 47.

55. *Id.* at 52 and 54.

56. *Id.* at 47.

57. *Id.*

58. Corr. Corp. of Am., Quarterly Report (Form 10-Q), *supra* note 36, at 37.

59. *Id.* at 36.

60. *Id.* at 39.

61. Corr. Corp. of Am., Annual Report (Form 10-K), *supra* note 43, at F-18.

62. *Id.*

63. Corr. Corp. of Am., Quarterly Report (Form 10-Q), *supra* note 36, at 34.

July 2012	Contract with Oklahoma expanded to house an additional 340 inmates at two CCA-owned facilities in the state. ⁶⁴
July 2012	New contract with Idaho DOC to house 800 inmates at Kit Carson facility in Colorado. ⁶⁵
June—September 2012	Renegotiation of lease of North Georgia Detention Center decreasing CCA's rent. Savings of 1.3 million annually. ⁶⁶
September 2012	New contract with AZ DOC to house up to 1,000 inmates at Red Rock facility in AZ. Ramping up to 90% guaranteed occupancy in 2015. ⁶⁷

As the list shows, in the last few years CCA has recurred to several adaptations to the financial crisis:

i. Compromising

Several of the major steps taken by CCA have involved reaching compromises with old customers about occupancy rates. In some of these cases, CCA has amended its agreements to reduced margins while preserving occupancy guarantees and solidifying contract terms. In other cases, CCA offered to settle for a slightly less packed occupancy rate. The report for the third quarter of 2012 regarding California's realignment program is a good example of the forgiving treatment CCA awards one of its best customers,⁶⁸ and is worth reading verbatim:

In November 2010, the State of California Department of Corrections and Rehabilitation (the "CDCR") extended the agreement with us to house up to 9,588 inmates at four of the five facilities we operated for them. The extension, which is subject to appropriations by the California legislature, began July 1, 2011 and expires June 30, 2013.

64. Corr. Corp. of Am., Quarterly Report (Form 10-Q), *supra* note 36, at 34.

65. *Id.*

66. *Id.*

67. *Id.*

68. See Corr. Corp. of Am., Annual Report (Form 10-K), *supra* note 43, at 52. Of CCA's state customers, California is a major contributor. In the years ended in December 31, 2011 and December 31, 2010, 13% of management revenue came from the California Department of Corrections and Rehabilitation.

In May 2011, the U.S. Supreme Court upheld a lower court ruling requiring California to reduce its inmate population to 137.5% of its then current capacity, or to 110,000 inmates, by May 24, 2013. As of September 30, 2012, the adult inmate population held in state of California institutions totaled approximately 120,000 inmates, which did not include the California inmates held in our out of state facilities. In connection with this ruling, the court set forth targeted reductions, measured every six months, to inmate populations held in the 33 facilities located in the state of California.

In an effort to meet the Federal court ruling, the fiscal year 2012 budget of the state of California called for a significant reallocation of responsibilities from state government to local jurisdictions, including housing certain lower level inmates currently the responsibility of the State. This realignment plan commenced on October 1, 2011 and has resulted in a reduction in state inmate populations of approximately 24,000.

As realignment has progressed, the state of California released a new five-year plan for their projected population and capacity needs, which envisioned recalling the inmates held in our facilities over the next several years resulting in an end to our agreement by June 2016. The plan included many proposed modifications, including but not limited to, a continued decline in the State's prison population through implementation of the realignment plan, an increase in the maximum occupancy of the California correctional system required by the U.S. Supreme Court from 137.5% to 145%, along with new in-state construction.

In June 2012, we announced an agreement that modified our existing contract with the CDCR to reduce the total number of inmates we house for California to an average daily population of 9,038 for the State's fiscal year ending June 30, 2013.

In September 2012, the three-judge panel rejected the State's proposal to modify the court's order to increase the maximum occupancy of its correctional system to 145% and instructed the State to operate at 137.5% of design capacity. In its response to the Court, the State indicated that a modification to the final population target will be warranted at an uncertain date in the

future and that the State would move for a modification again when such a motion is appropriate. If the 137.5% benchmark is indeed upheld, the State has acknowledged that alternatives such as continuing to house inmates out-of-state would have to be considered.

It is unclear at this time how realignment or the five-year plan may impact the long-term utilization by the CDCR of our out of state beds. The return of the California inmates to the state of California would have a significant adverse impact on our financial position, results of operations, and cash flows. We housed approximately 8,700 inmates from the state of California as of September 30, 2012, compared with approximately 9,500 California inmates as of September 30, 2011. Approximately 12% and 13% of our management revenue for the nine months ended September 30, 2012 and 2011, respectively, was generated from the CDCR.⁶⁹

It is also notable that CCA is not shy, in the face of such compromises, to assert its goal and how it plans on profiting from California's lack of foresight: "[W]e expect insufficient bed development by our partners to result in a return to the supply and demand imbalance that has benefited the private corrections industry."⁷⁰

ii. Changing Customers, Diversifying, and Proactive Marketing

Even as CCA is compromising its contract terms with some customers, it is on the prowl for new ones. As per its prospectus, CCA plans on incurring capital expenditures "to expand the design capacity of certain of our facilities (in order to retain management contracts) and to increase our inmate bed capacity for anticipated demand from current and future customers."⁷¹ The potential to grow is mentioned as well: "We will also consider opportunities for growth, including potential acquisitions of businesses within our line of business and those that provide complementary services, provided we believe such opportunities will broaden our market share and/or increase the services we can provide to our customers."⁷²

Indeed, in early 2012, the CCA sent a letter notifying state correctional officers that it had earmarked \$250 million to purchase state prisons in good

69. Corr. Corp. of Am., Quarterly Report (Form 10-Q), *supra* note 36, at 35.

70. *Id.* at 30.

71. Corr. Corp. of Am., Annual Report (Form 10-K), *supra* note 43, at 63.

72. *Id.*

condition and specified as one of the requirements “[a]n assurance by the agency partner that the agency has sufficient inmate population to maintain a minimum 90 percent [occupancy] rate over the term of the contract.”⁷³ States presented with this business opportunity responded with preoccupation that compliance with the required occupancy rate would mean reforming their sentencing laws to make them harsher.⁷⁴ As the former Kansas Secretary of Corrections stated, “My concern would be that our state would be obligated to maintain these (occupancy) rates and subtle pressure would be applied to make sentencing laws more severe with a clear intent to drive up the population.”⁷⁵

The dwindling state prison market has increased CCA’s interest in other opportunities. One such opportunity is Agecroft Prison Management, formerly owned by a subsidiary of CCA, which operates a correctional facility in England.⁷⁶ In 2011, CCA extended a working capital loan to Agecroft.⁷⁷ CCA also fully owns and operates TransCor, which provides transportation services to governmental agencies, and in particular inmate transport.⁷⁸ During the years ended December 31, 2009, 2008, and 2007, TransCor generated total consolidated revenue of \$4.0 million, \$6.9 million, and \$14.2 million, respectively, comprising 0.2%, 0.4%, and 1.0% of our total consolidated revenue in each respective year.⁷⁹ TransCor has been linked to various scandals and dysfunctions, including escape attempts and physical and sexual abuse of inmates by its drivers.⁸⁰

CCA’s reliance on collaborations with federal customers is particularly important, as the federal government’s share in its profits has risen in recent years.⁸¹ This market includes not only the Bureau of Prisons and the US

73. Letter from Harley Lappin, Chief Corr. Officer, Corr. Corp. of Amer., <http://big.assets.huffingtonpost.com/ccalletter.pdf>; see also Chris Kirkham, *Private Prison Corporation Offers Cash in Exchange for State Prisons*, THE HUFFINGTON POST (Feb. 14, 2012), http://www.huffingtonpost.com/2012/02/14/private-prisons-buying-stateprisons_n_1272143.html; see also Dina Rasor, *America’s Top Prison Corporation: A Study in Predatory Capitalism and Cronyism*, TRUTHOUT (May 3, 2012), <http://truth-out.org/news/item/8875-corrections-corporation-of-america-a-study-in-predatory-capitalism-and-cronyism>.

74. Kevin Johnson, *Private Purchasing of Prisons Locks Occupancy Rates*, USA TODAY (Mar. 8, 2012), <http://usatoday30.usatoday.com/news/nation/story/2012-03-01/buying-prisons-require-high-occupancy/53402894/1>.

75. *Id.*

76. Corr. Corp. of Am., Annual Report (Form 10-K), *supra* note 43, at F-12.

77. *Id.* at F-19.

78. *Id.* at 7.

79. *Id.*

80. ALEX FRIEDMANN, *For-Profit Transportation Companies: Taking the Prisoners and the Public for a Ride*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 270-274 (Tara Herivel & Paul Wright eds., The New Press, 2009).

81. See Corr. Corp. of Am., Annual Report (Form 10-K), *supra* note 43, at 48. Federal revenues increased \$31.5 million, or 4.4% from \$717.8 million in 2010 to \$749.3 million in 2011, comprising 43% of CCA’s total revenue for both of the years ended December 31, 2011 and 2010.

Marshals Service, but the increasing imprisonment needs of Immigration and Customs Enforcement (ICE).⁸² Detention services for undocumented immigrants are perceived as an emerging demand that can offset losses and setbacks resulting from the recession, the prison closures, and decarcerations in state corrections.⁸³ Immigration reform is perceived as threatening business,⁸⁴ which, according to CCA's annual report, "could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them."⁸⁵

Indeed, a growing share of the private prison market consists of privatized detention centers. Nearly half of all detained undocumented immigrants are housed in private facilities.⁸⁶ CCA, the largest contractor with ICE, operates a total of fifteen ICE-contracted facilities with a total of 5,800 beds.⁸⁷ The Geo Group, Inc. (GEO) is not far behind with and operates seven facilities with a total of 7,183 beds.⁸⁸ Moreover, in December 2010, GEO purchased B.I. Incorporated, a company that has lucrative government contracts with ICE is the sole administrator of ICE's alternatives to detention program.⁸⁹ The way the CCA and the private prison industry manage to not only find and exploit these opportunities, but also actively create them, is discussed below.

iii. Staying Afloat Politically

CCA exerts political influence by making donations independently and through its multiple political action committees, the "CCA," "Corrections

See also Corr. Corp. of Am., Annual Report (Form 10-Q), *supra* note 36, at 30. Federal customers also generated approximately 42% of CCA's total revenue for the three months ended September 30, 2012, and 44% for the same period in 2011, increasing \$0.4 million, from \$188.4 million during the three months ended September 30, 2011, to \$188.9 million during the three months ended September 30, 2012.

82. Corr. Corp. of Am., Annual Report (Form 10-Q), *supra* note 36, at 30.

83. Angelo Young, *Top Private Prison Operators Geo, Corrections Corp Of America Worry About Fewer Illegal Immigrants To Jail Because It's Good For Business*, INT'L BUS. TIMES (Mar. 21, 2013), <http://www.ibtimes.com/top-private-prison-operators-geo-corrections-corp-america-worry-about-fewer-illegal-immigrants-jail>.

84. *Id.*

85. Corr. Corp. of Am., Annual Report (Form 10-K), *supra* note 43, at 26. *See also* The Geo Grp., Inc., Annual Report (Form 10-K) 33 (Jan. 2, 2011) (showing similar statements in GEO's annual report, indicating that this is an industry trend).

86. Garance Burke & Laura Wides-Munoz, *Immigrants Prove Big Business for Prison Companies*, YAHOO! NEWS (Aug. 2, 2012), <http://news.yahoo.com/immigrants-prove-big-business-prison-companies-084353195.html>.

87. *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies*, NAT'L IMMIGR. FORUM, 7 (Aug. 2013), <http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf>.

88. *Id.*

89. *Id.*

Corporation of America,” and “America’s Leader in Partnership Corrections.”⁹⁰ Between 2003 and 2012, CCA contributed \$2,161,004 to political campaigns and ballot measures.⁹¹ Of that 2.1 million, 1.3 million (60.4%) went to Republican candidates, \$650,330 (30.1%) went to Democratic candidates, \$1,500 went to third-party or “other” candidates, and \$203,500 (9.4%) was donated to influence ballot measures.⁹²

By state, California received the greatest amount of those contributions, at \$715,350, followed by Florida at \$478,494, Georgia at \$285,000, and CCA’s home state of Tennessee at \$126,500.⁹³ The \$203,500 spent on ballot measures went to seven different ballot committees, including three in California.⁹⁴ Of the California contributions, in 2009, \$100,000 went to Budget Reform Now, a committee that supported a slew of budgetary propositions, in 2012, \$50,000 went to support California’s Proposition 30, the successful effort to raise taxes to fund public education, and in 2008, \$1,000 went to the Yes on 6 Committee to Take Back our Neighborhoods.⁹⁵ Furthermore, CCA contributed a grand total of \$1,858,094 to 239 different lobbyists between 2003 and 2011.⁹⁶ Again, California took the biggest slice of the pie with the most lobbyists at 16 and the highest contribution total at \$532,950.⁹⁷

Given CCA’s emerging interest in detention of undocumented immigrants, a market the industry perceives as a way to offset losses from recession-era corrections, it is particularly important to point out its role in shaping immigration policy. In April 2010, Arizona passed SB 1070, otherwise known as the Support Our Law Enforcement and Safe Neighborhoods Act.⁹⁸ SB 1070 allowed state law enforcement officials to profile possible undocumented immigrants during regular contact with community members and made traveling without documentation a state offense.⁹⁹ Later, in *Arizona v. United States*,¹⁰⁰ the Supreme Court

90. Noteworthy Contributor Summary for Corr. Corp. of Am., NAT’L INST. ON MONEY IN STATE POLITICS, <http://www.followthemoney.org/database/topcontributor.phtml?u=695&y=0> (last visited on Oct. 13, 2013).

91. *Id.*

92. NAT’L INST. ON MONEY IN STATE POLITICS, *supra* note 90.

93. *Id.*

94. *Id.*

95. *Id.*

96. Lobbyist Client Summary for Corr. Corp. of Am., NAT’L INST. ON MONEY IN STATE POLITICS, <http://www.followthemoney.org/database/lobbyistclient.phtml?lc=100552&y=0&s=CA#CA> (last visited on Oct. 13, 2013). It appeared to me that the 1.8 million in lobbying contributions was separate from the 2.1 million in political contributions, but that issue warrants a second look.

97. *Id.*

98. S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

99. *Id.*

100. *Arizona v. United States*, 132 S. Ct. 2492, 2494 (2012).

invalidated portions of the law on federal preemption grounds, but upheld the portion which allowed Arizona state police to investigate the immigration status of an individual stopped, detained, or arrested if there is reasonable suspicion that individual is in the country illegally.¹⁰¹

SB 1070 passed, in great part, due to the lobbying efforts and monetary contributions of private prison providers.¹⁰² CCA, a member of the American Legislative Exchange Council (ALEC), along with other powerful corporate actors, hoped to make SB 1070 into a model piece of legislation to be reproduced nationwide.¹⁰³ As reported by NPR, when the bill was introduced on the floor, it received an unprecedented support by 36 co-sponsors, two-thirds of whom either attended a preliminary planning meeting with ALEC or were ALEC members.¹⁰⁴ “That same week, the Corrections Corporation of America hired a powerful new lobbyist to work the capitol . . . thirty of the 36 co-sponsors received donations over the next six months, from prison lobbyists or prison companies—Corrections Corporation of America, Management and Training Corporation and The Geo Group.”¹⁰⁵

The private prison industry’s lobbying strategy is not dissimilar to the tactics employed by the California Corrections and Peace Officer Association (CCPOA), the powerful prison guard union that has played such a key role in creating California’s punitive legal landscape.¹⁰⁶ While clearly invested in the structure of mass incarceration, CCPOA has donated to Republican and Democrat candidates alike and targets special involvement legal propositions that advance their interests.¹⁰⁷ This method of hedging bets has allowed both CCA and CCPOA to remain afloat politically and continue to profit.

B. Trouble in the Land of Capitalism

i. *The Intangible Costs in Human Rights*

It is by now a cliché in private prison scholarship to argue the obvious:

101. Adam Liptak, *Blocking Parts of Arizona Law, Justices Allow Its Centerpiece*, N.Y. TIMES (June 25, 2012), http://www.nytimes.com/2012/06/26/us/supreme-court-rejects-part-of-arizona-immigration-law.html?_r=2&hp&sc=fb&cc=fp.

102. Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law?sc=fb&cc=fp>.

103. *Id.*

104. *Id.*

105. *Id.*

106. See e.g., JOSHUA PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA* (Oxford Univ. Press 2011).

107. *Id.*

a goal of economic profit is fundamentally at odds with any sort of rehabilitative focus. Several recession-era incidents show, in alarming ways, the ills stemming from the co-dependency between private prison companies and financially—strained state governments.

In a telling microcosm of the standards pervasive in private prisons across the nation, the country's first privately owned prison, the Corrections Corporation of Ohio—run as Ohio Correctional Facility, came under heat in early October 2012 after an audit report by the Ohio Department of Rehabilitation and Correction cited the CCA for 47 violations of state prison standards.¹⁰⁸ The audit also found that the CCA was in compliance with only “66.7 percent of the state’s standards.”¹⁰⁹

The history of abuse in Ohio's private prison began in 1997, when Corrections Corporation of America opened a private prison in economically downtrodden Youngstown, Ohio.¹¹⁰ CCA rushed to staff the prison “with inexperienced guards and then received 1,700 inmates—most charged with violent crimes—transferred from Washington, D.C., to the private prison. Within a year, 20 prisoners were stabbed and two were murdered. Six escaped.”¹¹¹ Following ubiquitous public outcry and negative media coverage, CCA was forced to close the prison once it became clear that the standards it was expected to hold its prison to would not prove profitable.¹¹²

In an act of collective amnesia, elected officials made a 2011 deal with CCA to “become the first state to sell a state-owned prison to a private company.”¹¹³ Far from being hesitant to do business with the company responsible for the disastrous Youngstown incident, the Ohio legislature “proudly touted the sale for its potential taxpayer savings.”¹¹⁴ The financial and legal implications of this Faustian bargain were atrocious. The benefit of using a private prison company was soon mitigated by the realization that the corporations (CCA?) did not want to hold high-risk inmates because it would require greater overhead costs for security and healthcare.¹¹⁵ Therefore, the (corporations) had an incentive to overcrowd

108. Leigh Owens, *Private Prison In Violation of Ohio State Law*, THE HUFFINGTON POST (Oct. 10, 2012), http://www.huffingtonpost.com/2012/10/09/private-prison-violates-state-law_n_1951917.html.

109. *Id.*

110. German Lopez, *Liberty for Sale: Should Ohio Inmates be Commodities in a For-Profit Venture*, CITY BEAT (Sept. 19, 2012), http://www.citybeat.com/cincinnati/article-26206-liberty_for_sale.html.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. ACLU OF OHIO, PRISONS FOR PROFIT: A LOOK AT PRISON PRIVATIZATION 14 (Apr. 2011), available at http://www.acluohio.org/assets/issues/CriminalJustice/PrisonsForProfit2011_04.pdf.

the institution with low-risk offenders.¹¹⁶ The result was constant pressure on the state regarding sentencing policies and occupancy.¹¹⁷ Even with less serious offenders, “private prisons had a 50 percent higher incidence of inmate-on-staff assaults and two-thirds higher incidence of inmate-on-inmate assaults than state-run prisons.”¹¹⁸ Furthermore, “the private prison industry’s own statistics show[ed] that at private prisons the turn-over rate was 53 percent, while at public prisons it was a mere 16 percent.”¹¹⁹

A variation on this theme is incarceration in Louisiana. The state houses more inmates per capita than any other state in the U.S.¹²⁰ Louisiana presents a particularly bleak case study of the devastating impact of prison privatization on the criminal justice system. Most of the state’s inmates are housed in for-profit facilities.¹²¹ While a number of states increasingly rely on private prisons to house their inmates, Louisiana’s prisons’ infrastructure is notable for the fact that “most prison entrepreneurs are rural sheriffs, who hold tremendous sway in remote parishes.”¹²² The practical effect of this is that, “if the inmate count dips, sheriffs bleed money. Their constituents lose jobs. The prison lobby ensures this does not happen by thwarting nearly every reform that could result in fewer people behind bars.”¹²³ On the heels of pervasive reports regarding deplorable conditions in corporate-run prisons, there appear to be signs that a backlash may be on the horizon.

The recent closure of a private prison in rural Kentucky highlights the tension between state economic needs, and a lack of oversight and quality regulation in the private prison system.¹²⁴ Otter Creek Correctional Center in Wheelwright, Kentucky had its state funding pulled in August of 2012 after Hawaii removed all 168 female inmates it had housed at the facility due to allegations of sexual abuse by prison guards.¹²⁵ Despite the alleged

116. PRISONS FOR PROFIT, *supra* note 115.

117. *Id.*

118. ACLU OF OHIO, *supra* note 115 at 13.

119. *Id.* A higher turnover rate implies less-knowledgeable staff and decreased stability.

120. Cindy Chang, *Louisiana is the World’s Prison Capital*, THE TIMES-PICAYUNE (May 13, 2012), http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html. One in every 86 Louisiana adults is in prison, twice the national average. Charles M. Blow, *Plantations, Prisons and Profits*, N.Y. TIMES (May 25, 2012), http://www.nytimes.com/2012/05/26/opinion/blow-plantations-prisons-and-profits.html?_r=1&. Louisiana has the highest percentage of inmates serving life without parole, spends more on local inmates than any other state, and two-thirds of its inmates are nonviolent offenders.

121. *Id.*

122. *Id.*

123. *Id.*

124. Brett Barrouquere, *Rural Ky. Town Readies For Private Prison Closure*, FOX NEWS (Apr. 24, 2012), <http://www.foxnews.com/us/2012/04/24/rural-ky-town-readies-for-private-prison-closure/>. Other aspects of Hawaii’s choice to house its inmates out of states are discussed below.

125. *Id.*

abuses that led to Otter Creek being shut down, “because Eastern Kentucky is one of the poorest rural regions in the country, the prison was welcomed by local residents desperate for jobs.”¹²⁶ Historically, Wheelwright was a company town founded by a coal company in 1916 and saw its economy grind to a halt as coal production slowed.¹²⁷ However, the Otter Creek Correctional Facility “brought nearly 200 jobs to one of the poorest regions in the South when it opened in 1981. CCA paid employees \$8.25 an hour—low pay by prison standards but welcome cash for the area.”¹²⁸ This relationship between CCA and Wheelwright highlights one of the dangers of private prisons being run in impoverished areas.¹²⁹ These types of areas often rely on the prisons for a much-needed economic boost and there tends to be a lack of rigor in the oversight of the prisons’ management and maintenance.¹³⁰

In another egregious instance of private prisons run amok, GEO removed its presence entirely from Mississippi in April 2012, after Federal Judge Carlton Reeves wrote that GEO, which ran the Walnut Grove Youth Correctional Facility had “allowed a cesspool of unconstitutional and inhuman acts and conditions to germinate, the sum of which places the offenders at substantial and ongoing risk.”¹³¹ A scathing report by the Department of Justice found that, among other practices at the 1,450 bed prison housing “inmates ages 13 to 22 who are minors convicted as adults,” that prison staff routinely had sex with underage inmates, “poorly-trained guards brutally beat youth and used excessive pepper spray,” prison guards turned a blind eye to inmates possessing homemade knives that were used in “gang fights and inmate rapes,” and perhaps most shockingly, that some guards themselves were members of gangs.¹³²

The corporate profit motive that is increasingly permeating the prison system affects more than just the well-being of prisoners in privately run

126. Ian Urbina, *Hawaii to Remove Inmates Over Abuse Charges*, N.Y. TIMES, Aug. 26, 2009, at A12, available at http://www.nytimes.com/2009/08/26/us/26kentucky.html?_r=0.

127. *Hawaii to Remove Inmates*, *supra* note 126.

128. *Id.*

129. *Id.*

130. For more on private prison providers’ promises to improve the economy of prospective prison towns, see e.g., RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007). See also Clayton Mosher, Gregory Hooks & Peter B. Hood, *Don’t Build It Here: The Hype Versus the Reality of Prisons and Local Employment*, in *PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION* 90-98 (Tara Herivel & Paul Wright eds., The New Press, 2009). An economic analysis of before-and-after economic conditions suggests that such towns end up not benefitting from the prison industry as promised, because locals are seldom hired to work in the prisons, and staff chooses to live elsewhere.

131. John Burnett, *Miss. Prison Operator Out; Facility Called a “Cesspool,”* NPR (Apr. 24, 2012), <http://www.npr.org/2012/04/24/151276620/firm-leaves-miss-after-its-prison-is-called-cesspool>.

132. *Id.*

facilities. Additionally, the emergence of private probation outfits has led to allegations that probationary decision-making has shifted from ostensibly neutral courts to for-profit corporations looking to reap financial gain by using probation as a tool to fine and fee cash-strapped individuals.¹³³ A class action lawsuit pending in Alabama claims that the privately run Judicial Correction Services (JCS) using for its own financial gain a probation system run amok.¹³⁴ Under the preexisting system in towns such as Childersburg, Alabama, people unable to pay fines imposed by the town for violations such as speeding are routinely placed on probation.¹³⁵ Once placed on probation, JCS is tasked with aggressively collecting fines against these individuals.¹³⁶ Rather than charge public authorities for their services, companies like JCS work for municipalities for free and turn a profit by attaching fees to a defendants' bills.¹³⁷ This emerging paradigm "is about the mushrooming of fines and fees levied by money-starved towns across the country and for-profit businesses that administer the system. The result is that growing numbers of poor people . . . are ending up in jail and in debt for minor infractions."¹³⁸

ii. Is it really worth it?

The risks and cautionary tales about private prisons raise the question whether recession-era local governments benefit, from privatizing their correctional systems in the bottom line. While the benefits of the private prison industry obviously outweigh the costs for the providers themselves, it is more difficult to determine whether, from the perspective of state and local governments, private institutions are truly more economically viable than their public counterparts. In a comparative study of prison assessment, Gerry Gaes found that different organizations came to different conclusions about the cost/performance equation of private and public prisons.¹³⁹ Specifically, he found differences between the way ABT Associates and the Bureau of Prisons assessed Taft, a private prison, in comparison to public institutions.¹⁴⁰ The significant differences in assessing per diem costs per

133. Mike Oliver, *Private Probation Outfits Raise Eyebrows Over Profit Seeking*, ALABAMA LIVE (Sept. 16, 2012), http://blog.al.com/spotnews/2012/09/private_probation_outfits_rais.html.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Ethan Bronner, *Poor Land in Jail as Companies add Huge Fees for Probation*, N.Y. TIMES (July 2, 2012), <http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html?pagewanted=all>.

139. Gerry Gaes, *Cost Performance Studies Look at Prison Privatization*, 259 NAT'L INST. OF JUST. J. 32, 33 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/221507.pdf>.

140. *Id.*

inmate were due to discrepancies in population sizes (private prisons with more inmates per year benefit from economies of scale, and any comparison between them and less-populated state prisons require adjusting the analysis to account for the difference) and in assessing overhead costs (governmental contribution may exceed the reported overhead).¹⁴¹

One more important consideration is that private and public prisons' performances are assessed in different ways: Private prisons tend to be measured in terms of compliance with contract terms, whereas public prisons' performances are measured based on parameters established by auditors,¹⁴² which becomes even more complicated considering that contract terms between private prisons and the government often differ on a contract-to-contract basis. Additionally, the definitions of misconduct may differ from assessor to assessor; for example, while research groups included two escapes that had occurred at Taft, while the Bureau of Prisons only noted a situation in which 1,000 inmates had refused to return to their cells by curfew.¹⁴³

Another factor complicating the ability to compare private and public prisons is that their starting points, in terms of population type, are frequently different. A 2004 study found that "state-run prisons are generally left to take on a disproportionate number of expensive and high-risk inmates. For example, inmates with minimum or medium levels of security classification made up 90 percent of the private sector's population, compared with only 69 percent in the public sector."¹⁴⁴ The comparison is problematic under these conditions.

The adaptation strategies of private prison providers are a grim reminder that correctional developments motivated by financial prudence do not always lead away from punitivism, but they are not the only such development. We now turn to another marker of correctional austerity: Charging the inmates for their custodial experience.

II. The Inmates As Consumers: Rolling Incarceration Costs Onto Inmates

Yelp, a popular website featuring reviews of restaurants, businesses, and venues, also offers reviews of some less-expected institutions. San

141. *Cost Performance Studies*, *supra* note 139, at 34.

142. *Id.* at 35. This "internal yardstick" is reminiscent of Feeley and Simon's comment in *The New Penology* about how actuarial justice is based on internal measures, such as number of escapes, rather than on external, utilitarian goals like recidivism reduction. See Malcom M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 *CRIMINOLOGY* 449 (1992).

143. *Id.* at 36.

144. Mason, *supra* note 25, at 8, citing Curtis R. Blakely & Vic W. Bumphus, *Private and Public Sector Prisons*, 68(1) *FED. PROBATION* 27 (2004).

Quentin State Prison, the recipient of three stars on Yelp,¹⁴⁵ was reviewed thusly:

I really wanted to love this place. I heard that the kitchen used local farms and put great thought in to their seasonally changing menu and the service was not exactly friendly but 'efficient.' Boy was I wrong . . . It was pretty busy, but I was able to find a table. Again, I understand this is buffet style, but when I asked the gentleman by the front door near where I was sitting if I could sit further from the door he was SUPER RUDE about it. He just motioned for me to sit back down, but at least the front door led to a hallway and not the outside, so although it was raining, I figured I'd be fine.¹⁴⁶

Similarly, the Los Angeles County Jail received the following questionable endorsement:

A Hotel for criminals and the like! Stay for free and enjoy complimentary breakfast, lunch AND dinner! While you are sharing space with other criminals, you can still enjoy your stay even more with indefinite alone time, reading material such as La Opinion, and if you are lucky, a 22in LCD TV might just be working that day!

You also get complimentary alarm clock service, laundry (no dry clean), medical and psychological services, and 24 hour protection from correctional officers and sheriff deputies. Smiley faces all around =)¹⁴⁷

The concept of prison services being reviewed for quality by inmates themselves seems less ludicrous if one considers the increasing tendency to think of them as consumers. One of the markers of the cost-centered correctional discourse is a shift away from regarding inmates as wards of a *parens patriae* state, that is under obligation to provide them with all their needs during the period of incarceration, and toward viewing them as service consumers who take up precious resources and should carry their

145. *San Quentin State Prison*, YELP, <http://www.yelp.com/biz/san-quentin-state-prison-san-quentin> (last visited Oct. 14, 2013).

146. Dylan D., Review of *San Quentin State Prison*, YELP (Feb. 13, 2013), http://www.yelp.com/biz/san-quentin-state-prison-sanquentin#hrid:hgDF7mYlw14DbFMhZ_OBkA.

147. Long T., Review of *L.A. County Jail*, YELP (Aug. 22, 2012), http://www.yelp.com/biz/l-a-county-jail-los-angeles-2#hrid:uJAUUPp_G5q6it3CCXD5MA.

own weight. It is little wonder that inmates feel entitled to review services they increasingly have to pay for.

The idea of “pay to stay” existed long before the recession. Kirsten Livingston’s 2007 survey of such practices reveals that the criminal justice system was already levying costs on inmates, including payments for victim compensation, court security, and probation fees as early as the late 1980s.¹⁴⁸ In the early 2000s, we saw the introduction of new fees, such as fees for electronic monitoring, sex offender registration, and, shockingly, room and board, as well as an increase in existing fees.¹⁴⁹ Inmates were saddled with a variety of fees and the costs of their diversion programs, and Livingston mentions cases of inmates doing time for debts incurred to the criminal justice system.¹⁵⁰ These problematic aspects of “pay as you stay” have become worse in the recession. Fueled by panic about the impact of the California Realignment on local jails, Riverside Jail and other county institutions are recurring to room-and-board fees to the tune of \$140 per night to cover the expected costs from the addition to their population.¹⁵¹

Cost-rolling programs are ostensibly geared toward properly compensating victims, teaching inmates moral lessons and fiscal responsibility, and to avoid raising taxes; but, as Livingston points out, those goals have remained elusive.¹⁵² A recent New York State Bar survey found that 80% of all criminal defendants charged with a felony in the United States are indigent.¹⁵³ People of color are also overrepresented in the inmate population.¹⁵⁴ The implication is that court-imposed debt adds a layer of disadvantage unto the shoulders of already-disadvantaged populations.¹⁵⁵ Moreover, inmates who leave the correctional system with liens for jail rooms and board clearly face obstacles to rehabilitation that do not favorably impact their recidivism risks.¹⁵⁶

Beyond these utilitarian issues, “pay to stay” policies raise serious questions of fairness. Clearly, entering a correctional facility is not

148. Kirsten Livingston, *Making the “Bad Guy” Pay: Growing Use of Cost Shifting as an Economic Sanction*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 60-62 (Tara Herivel & Paul Wright eds., The New Press, 2009).

149. Kim Buchanan, *It Could Happen to ‘You’: Pay-to-Stay Jail Upgrades*, 106 MICH. L. REV. FIRST IMPRESSIONS 60, 61 (2007), available at <http://www.michiganlawreview.org/n/articles/it-could-happen-to-you-pay-to-stay-jail-upgrades>.

150. Livingston, *supra* note 148.

151. Jennifer Medina, *In California, a Plan to Charge Inmates for their Stay*, N.Y. TIMES (Dec. 11, 2011), http://www.nytimes.com/2011/12/12/us/in-riverside-california-a-plan-to-charge-inmates.html?_r=1&adxnnl=1&src=ISMR_AP_LI_LST_FB&adxnnlx=1378062950u2fNHQbzYxlpZoxQyE/nfA (last visited Sept. 1, 2013).

152. Livingston, *supra* note 148, at 53.

153. *Id.* at 56.

154. *Id.* at 57.

155. *Id.*

156. *Id.* at 55.

tantamount to voluntary consumption of products and services, and charging astronomical fees for the experience is akin to punishing one twice for the same offense (“you will pay by enduring incarceration, and by paying for enduring incarceration”). While taxpayers may feel that it is unfair for them to shoulder the costs of someone else’s wrongdoing, it is just as unfair to levy those costs against people who are not incurring them voluntarily. Moreover, a population already disenfranchised, by class proxies and by felon status, does not have a real say in the costs being levied, which makes the “inmate as consumer” metaphor even more absurd.

The absurdity is compounded by the terminology accompanying the inmate-as-customer metaphor. Robert Weisberg, reporting on the Santa Ana jail’s “pay as you stay” brochure, wryly comments:

[the brochure] tells us that the jail “is pleased to host a full range of alternatives to traditional incarceration”; it reassures prospective “clients” seeking flexible work/jail schedules (“Work on Saturday or Sunday? No problem, your weekend days are our weekend days.”); it guarantees “24-hour on-site medical staff”; it accommodates inmates near and far (“We have helped clients with sentences from other counties as well as other states.”); and it generally brags that the jail “is the most modern and comfortable facility in the region,” where, à la Cheers, “Each of our clients has a name . . .”

Surely this manifestation of pay-to-stay is embarrassing. But, as so honestly represented, pay-to-stay could prove salutary for the criminal justice system if recognized as part of our somewhat ritualized cycle of constructive self-embarrassment over the role of wealth in criminal justice. More specifically, pay-to-stay could become one of those occasional eruptions of transparency about the forms of currency exchanged in the market for punishment.¹⁵⁷

Unfortunately, Weisberg’s hope that the absurdity will expose the embarrassment seems misplaced. The serious concerns arising from pay-to-stay policies regarding fairness, proportionality, and disenfranchisement, have been lost in translation when inmates have attempted to argue their unconstitutionality in courts. A variety of constitutional challenges were

157. Robert Weisberg, *Pay-to-Stay in California Jails and the Value of Systemic Self-Embarrassment* 106 MICH. L. REV. FIRST IMPRESSIONS 55 (2007) available at <http://www.michiganlawreview.org/articles/pay-to-stay-in-california-jails-and-the-value-of-systemic-self-embarrassment> (last visited Oct. 14, 2013).

raised in federal courts and all of them have been rejected.¹⁵⁸ Only recently, Tennessee commissioners have approved pay-to-stay regimes in jails, finding no constitutional violation.¹⁵⁹

The most recent manifestation of the inmate-as-customer mindset is the creation of experiential tiers in prison and explicitly charging inmates more for comfort. The Fremont Police Department recently announced its intention to offer inmates a “pay-to-stay” option.¹⁶⁰ For a one-time fee of \$45, and a “hotel payment” of \$155 per night,

... prisoners serving short sentences on lesser charges can stay in a smaller facility while avoiding county jails.

“It’s still a jail; there’s no special treatment,” Lt. Mark Devine, a Fremont police official who oversees the program, told Chris De Benedetti of the *Argus*. “They get the same cot, blanket and food as anybody in the county jail, except that our jail is smaller, quieter and away from the county jail population.”¹⁶¹

The notion of creating tiers of comfort in prison, and allowing inmates to upgrade their prison experience as if they were airfare ticket purchasers, offends not only the notion of state responsibility but that of equality before the law. Of course, it is inevitable that some inmates’ incarceration experience is more pleasant than others’. However, state sanctioning of such tiered experiences is intolerable. It also has serious implications for race and class differentiation. It is one more example of the “inmate as consumer” perception run amok.

158. See e.g., *Tillman v. Lebanon County Correctional Facility*, 221 F.3d 410, 416 (3d Cir. 2000) (arguing excessive fines, cruel and unusual punishment, and even equal protection, as another inmate was not saddled with his incarceration costs). See also Joshua Michtom, *Making Prisoners Pay for Their Stay: How a Popular Correctional Program Violates the Ex Post Facto Clause*, 13 B.U. PUB. INT. L.J. 187 (2004), available at <http://www.bu.edu/law/central/jd/organizations/journals/pilj/vol13no2/documents/13-2MichtomNote.pdf> (some advocate using an ex post facto argument, but the argument was not raised in *Tillman*).

159. Lauren Brooke-Eisen, *Tennessee Inmates Must ‘Pay-to-Stay’*, BRENNAN CTR. FOR JUST. (Aug. 28, 2013), <http://www.brennancenter.org/blog/tennessee-inmates-pay-stay> (last visited Sept. 1, 2013).

160. *California Prison’s ‘Pay-To-Stay’ Option Offers ‘Quieter’ Rooms For \$155 A Day*, THE HUFFINGTON POST (Jul. 28, 2013), http://www.huffingtonpost.com/2013/07/28/california-prison-pay-to-stay_n_3667573.html.

161. *Id.*

III. Prison Closures: Crowding, Repurposing, and Beds for Sale

Another impact of the financial crisis has been a trend of prison closures.

In 2011, 13 states were closing prisons or in the process of it. Michigan has now closed 22 facilities since 2002. New York State Governor Andrew Cuomo announced plans last year to close seven. And legislators in Texas—a state that had tripled its prison capacity since the late '80's—recently opted to close the 102-year-old Sugar Land prison.¹⁶²

A 2011 report by The Sentencing Project elaborates on the recent incidences of prison closures, noting that Michigan's prison closures are due predominantly to reform in the areas of sentencing and parole.¹⁶³ A December 2012 follow-up report on The Sentencing Project's 2011 findings uncovered that in addition to the 13 states that reported prison closures in 2011, "In 2012, at least six states have closed 20 prison institutions or are contemplating doing so, potentially reducing prison capacity by over 14,100 beds and resulting in an estimated \$337 million in savings."¹⁶⁴ Particularly, "[d]uring 2012, Florida led the nation in prison closings with its closure of 10 correctional facilities; the state's estimated cost savings for prison closings totals over \$65 million."¹⁶⁵

One conundrum that states have faced over the past several years is that, "while funds to manage expensive prison systems have lessened, so too have resources for services such as treatment for substance abuse and mental health."¹⁶⁶ At the same time, as of 2011, The National Conference of State Legislatures found that "corrections and public safety spending were above budgeted levels in seven states, including Alaska, where corrections spending exceed the state's \$258 million corrections budget by \$9 million."¹⁶⁷ Compounding the problem of corrections overspending is

162. Emily Badger, *America Is Finally Closing Prisons. Now What Do We Do With Them?*, THE ATLANTIC CITIES (Dec. 6, 2012), <http://www.theatlanticcities.com/design/2012/12/america-finally-closing-prisons-now-what-do-them/4083/#>.

163. Nicole D. Porter, *On the Chopping Block 2012: State Prison Closings*, THE SENT'G PROJ., Dec. 2012, at 1, <http://sentencingproject.org/doc/publications/On%20the%20Chopping%20Block%202012.pdf>.

164. *Id.*

165. *Id.*

166. Nicole D. Porter, *On the Chopping Block 2011*, THE SENT'G PROJ., Sept. 2011, at 2, http://sentencingproject.org/doc/publications/On_the_chopping_block__state_prison_closings_%282%29.pdf.

167. *Id.*

the fact that many government jobs hinge on a robust corrections infrastructure.¹⁶⁸ Michigan provides a case in point, where the prison population has significantly declined, but “state lawmakers are still continuing work to contain costs where one out of three state employees works in the criminal justice system and the corrections budget represents 23% of state general funds.”¹⁶⁹

But are prison closures merely a reflection of budget shortages, or do they represent a bigger ideological shift? In assessing potential causes of prison closures, Adam Gelb, director of the Public Safety Performance Project with the Pew Center on the states, dismisses the notion that the recent rash of prison closures is entirely driven by dwindling state budgets and economic concerns.¹⁷⁰ Rather, Gelb suggests that there has been an ideological shift “by the public, politicians and public safety professionals, with the result that we may be entering a new phase of America’s complex relationship to incarceration, one in which we now have to figure out what to do with all these empty, peculiar and often isolated buildings.”¹⁷¹ Gelb attributes this shift in thinking to public safety professionals learning:

[m]uch more than they knew 35 years ago about how to keep people from re-offending, and they have better tools to manage offenders without using prison cells (better treatment programs, GPS tracking devices, alcohol detection ignition locks in cars). The public has also grown weary of the War on Drugs that helped fuel or prison boom. Last month, Colorado and Washington voted to legalize marijuana. And California voters passed a referendum de-fanging the states “three strikes” law. Even political antipodes from Newt Gingrich to the ACLU have been jointly backing prison reform.¹⁷²

In what appears to be an ideological shift, both the federal and state governments have refocused their efforts away from keeping prisons full and more towards reducing recidivism. A recent editorial in the New York Times suggests that this shift is partially due to the Second Chance Act of 2008, which aims to assist states in reducing recidivism.¹⁷³ By honing in on reducing recidivism rates, state governments aim to both decrease crime as

168. Porter, *supra* note 163, at 4.

169. *Id.*

170. Badger, *supra* note 162.

171. *Id.*

172. *Id.*

173. Editorial, *How to Cut Prison Costs*, N.Y. TIMES (Nov. 11, 2012), <http://www.nytimes.com/2012/11/11/opinion/sunday/how-to-cut-prison-costs.html>.

well as cut prison costs. New York in particular, now has “a glut of vacant correctional facilities because of lower crime rates, new programs that allow early release for nonviolent offenders, and the dismantling of its strict drug laws.”¹⁷⁴ Following predecessor Governor David Paterson’s lead in closing three prisons during his tenure, current New York Governor Andrew Cuomo announced that, “prisons were ‘not an employment program,’ and proceeded to shut seven of the state’s remaining 67 correctional facilities, removing 3,800 beds.”¹⁷⁵ This trend is a sharp departure from previous prison policy in the state. As with many recent prison reforms, the shift towards closing prisons can be largely attributed to a change in the state’s view of drug sentencing. Particularly, “[a]fter New York adopted mandatory drug sentences in 1973, the state’s prison population soared from 13,437 to a peak of 71,472 in 1999, prompting a boom in prison construction.”¹⁷⁶ However, “since then, the number of inmates in state facilities has fallen nearly a quarter, to about 55,000, leaving thousands of empty beds.”¹⁷⁷

Part of the driving force behind the trend in prison closures is sentencing reform. In recent years,

[l]awmakers in Kansas, Michigan, New Jersey, and New York enacted a mix of administrative and legislative policies that contributed to sustained prison population reductions of 5-20%. In each of these states a range of policy changes were adopted, including sentencing reforms, alternatives for “prison bound” people, reducing time served in prison, addressing parole release rates, and reducing revocations. The ability of these four states to control prison growth shows that policymakers and practitioners can collaborate to reduce the reliance on incarceration while maintaining public safety.¹⁷⁸

As public safety and corrections officials have come to realize that keeping prisons full has been ineffective in deterring “drug market participation,” steps have been taken to pursue policy changes that focus on rehabilitation and treatment in tandem with reducing the number of people in jails.¹⁷⁹ In 2012, Missouri

174. Thomas Kaplan, *New York Has Some Prisons to Sell You*, N.Y. TIMES (May 27, 2012), <http://www.nytimes.com/2012/05/28/nyregion/closed-new-york-prisons-prove-hard-to-sell.html>.

175. *Id.*

176. *New York Has Some Prisons*, *supra* note 174.

177. *Id.*

178. Porter, *supra* note 166 at 2.

179. *Id.* at 3.

[p]olicymakers reduced national the nation's most severe sentencing disparity for crack and powder cocaine when they changed the drug quantities that triggered a mandatory minimum prison sentence. Louisiana lawmakers authorized judges to depart from statutory penalties for certain persons who cooperate with law enforcement officials.¹⁸⁰

The table below illustrates a breakdown of the projected prison closures in 2012. As the data shows, many of the institutions that are being closed or under consideration are located in Southern states, typically regarded as more punitive.¹⁸¹

States Closing or Considering Closing Correctional Facilities in 2012

State	Correctional Facility	Operational Capacity	Est. First Year Savings
California	California Rehabilitation Center	3,900 beds	\$160, 000, 000
Colorado	Colorado State Penitentiary II	316 beds	\$4,500,000
Florida	Broward Correctional Institution	611 beds	\$2,523, 371
Florida	Caryville Work Camp	133 beds	\$1,728, 792
Florida	Demily Correctional Institution	342 beds	\$6,068,260

180. Porter, *supra* note 166 at 3.

181. For more on the heritage of punitiveness in the south, see ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010); MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2009). Data source: Nicole D. Porter, *On the Chopping Block 2012: State Prison Closings*, 5, (Dec. 2012), available at <http://sentencingproject.org/doc/publications/On%20the%20Chopping%20Block%202012.pdf>.

Florida	Gainesville Correctional Institution	507 beds	\$9,038, 845
Florida	Hendry Work Camp	280 beds	\$4,028, 832
Florida	Hillsborough Correctional Institution	431 beds	\$8, 314, 653
Florida	Indian River Correctional Institution	381 beds	\$8, 027, 931
Florida	Levy Forestry Camp	292 beds	\$3, 866, 263
Florida	New River Correctional Institution	1,363 beds	\$17, 644, 740
Florida	River Junction Work Camp	736 beds	\$4, 268, 454
Illinois	Dwight Correctional Center	1,212 beds	\$36, 900,000
Illinois	Joliet Renaissance Center— Youth Center	344 beds	\$11, 700,000
Illinois	Murphysboro Youth Prison	156 beds	\$6,000,000
Illinois	Tamms Super Maximum Security Correctional Center	700 beds	\$25, 600,000
Kentucky	Otter Creek Correctional Center	656 beds	\$9,450,000
Louisiana	C. Paul Phelps Correctional Center	942 beds	\$12,000,000
Louisiana	Forcht-Wade Correctional	498 beds	\$2,700,000

	Center		
Louisiana	J. Levy Dabadie Correctional Center	300 beds	\$3,000,000
Total Beds and Project Cost Savings		14,100 beds	\$337, 380,141

In light of prison closures being closed to save vital resources, “at midyear for fiscal year 2012 states reported cutting correctional expenditures by \$67.5 million.”¹⁸² Furthermore, “[a]n examination of projected budgets for fiscal year 2013 indicates that at least 12 states are planning to decrease correctional expenditures, with prison closures being one mechanism to do so.”¹⁸³ But beyond the obvious savings, how have the closures impacted prison conditions?

Some of the reports have been encouraging, as some of the prison closures stem from actual sentencing reforms. But in some cases, prison closures unaccompanied by a proportionate decrease in inmate numbers just means more overcrowding. In Illinois, Governor Quinn had to defend his initiative to shut down prisons in court,¹⁸⁴ and then battled the resulting overcrowding by filling gymnasiums with beds.¹⁸⁵ Similar concerns about overcrowding arose in Boston¹⁸⁶ and New York.¹⁸⁷

Another important question pertains to the ability to repurpose closing prisons. In some cases, states have been able to use closed men’s prisons as women’s prisons, repurpose juvenile institutions as adult institutions, and the like. Some institutions present special problems in that regard;

182. Porter, *supra* note 163, at 3.

183. *Id.*

184. Kurt Erickson, *Court Lifts Prison Closures Injunction; Quinn Pledges Action within Weeks*, HERALD & REV. (Feb. 20, 2012), http://herald-review.com/news/state-and-regional/court-lifts-prison-closures-injunction-quinn-pledges-action-within-weeks/article_4d70ccca-4a6d-11e2bc63-0019bb2963f4.html (last visited Sept. 1, 2013).

185. Monique Garcia & Rafael Guerrero, *Quinn Stands by Decision to Close 2 Prisons, Despite Inmate Crowding*, CHI. TRIB. (Feb. 18, 2013), http://articles.chicagotribune.com/2013-02-18/news/ct-met-quinn-prison-closures-0219-20130219_1_three-transitional-centers-inmate-population-tamms (last visited Sept. 1, 2013); see also Aaron Cynic, *Quinn Defends Prison Closures Amid Overcrowding Complaints*, CHICAGOIST (Feb. 22, 2013), <http://chicagoist.com/2013/02/22/despite-overcrowding-quinn-defends.php> (last visited Sept. 1, 2013).

186. Johanna Kaiser, *Officials on Prison-Closure Plan: They’re Already Overcrowded*, LOWELL SUN (Jan. 28, 2011), http://www.lowellsun.com/todaysheadlines/ci_17226167 (last visited Sept. 1, 2013).

187. Cara Matthews, *Union: Prisons Overcrowded; State Shouldn’t Close More*, POL. ON THE HUDSON (Mar. 23, 2011), <http://polhudson.lohudblogs.com/2011/03/23/union-prisons-are-overcrowded-state-shouldnt-close-more> (last visited Sept. 1, 2013).

maximum-security prisons with Secure Housing Units (SHU) in them, which are small and windowless, are unable to serve other purposes. Nonetheless, the Vera Institute and the ACLU were able to implement its segregation reduction project in Illinois, Maine, Mississippi, Colorado, and Michigan, where states figured that, even with cells left empty and repurposed, there were considerable fiscal savings involved in emptying them.¹⁸⁸

But one of the most important ways in which states can repurpose their closed prisons can be offering the space to less prudent states. We now turn to a phenomenon that combines privatization, prison closures and repurposing: a massive trend of incarcerating inmates out of state.

IV. The Inmate Export Business: Geographic Shifts in Incarceration

Chronic prison overcrowding has resulted in a trend towards exporting more and more prisoners across state lines. Prisoners are transferred across states by way of enforceable legal contracts known as “interstate compacts.”¹⁸⁹ Currently, there are three interstate compacts governing the transfer of inmates across state lines: “the National Interstate Compact for Corrections” (national) and “the Western Corrections Compact and New England Corrections Compact” (both regional). Forty states are currently signed on to the national agreement, although there are other mechanisms by which the interstate transfer of inmates may occur, including by statute or court order.¹⁹⁰

As of July 1, 2005, Departments of Corrections in at least 43 states had inmates on transferred status in the custody of other public agencies. Approximately 4,900 inmates were on transferred status nationwide; of this number, there were 2,089 state-sentenced inmates were transferred between state prison systems, 345 were transferred to the Federal Bureau of Prisons, and 2,466 were transferred to private prisons in another state.¹⁹¹

188. ACLU, *State Reforms to Reduce the Use of Solitary Confinement*, https://www.aclu.org/files/assets/state_reforms_to_limit_the_use_of_solitary_confinement.pdf (last visited Oct. 21, 2013).

189. Randall G. Shelden & Selena Teji, *Collateral Consequences of Interstate Transfers of Prisoners*, CTR. ON JUV. AND CRIM. JUST. 1 (July 2012), http://www.cjcj.org/uploads/cjcj/documents/Out_of_state_transfers.pdf.

190. *Id.* at 2.

191. *Id.*, citing Morris L. Thigpen, George Keiser & Kermit Humphries, *Interstate Transfer of Prison Inmates in the United States*, SPECIAL ISSUES IN CORR., Feb. 2006.

The primary reason for interstate transfer of inmates was prison overcrowding, followed by inmate safety.¹⁹² Of the transfers due to overcrowding, 95% were sent to private prisons.¹⁹³ The explosive growth of private prisons during the 1980s served a dual purpose: to accommodate the tough-on-crime ideology that was increasingly permeating the national consciousness and to provide economic opportunities for towns that suffered from a decline in manufacturing and other industries.¹⁹⁴ Prisons began to pop up in rural and more isolated areas that had suffered economically, the collateral effect of which was more and more prisoners being shipped off to serve sentences far away from their homes and families.¹⁹⁵

Studies suggest that this separation from the familial structure can significantly hinder prisoners' rehabilitation, which, in turn, increases the risk of recidivism. As Shelden and Teji note, "[i]nterstate transfer virtually eliminates visitation by family members; exacerbated when private prisons are involved as they are not held to the same visitation and rehabilitation standards as the sending state."¹⁹⁶ The ramifications of the depletion of state prison resources extend beyond the financial and practical impact on the state infrastructure. Inmates shipped to private prisons far away from their home states also face psychological repercussions resulting from being hundreds, or even thousands, of miles away from their families. Almost all of the 30% of Alaska's inmates living in private prison facilities do so in Arizona.¹⁹⁷ In 2000, an Alaskan court went so far as to rule that a prisoner who was moved to a CCA facility in Arizona had his Constitutional rights jeopardized because the Alaska Constitution guarantees a prisoner's right to rehabilitation, and that visitation was part and parcel of the rehabilitative process.¹⁹⁸ By shipping the prisoner to Arizona, the state was effectively preventing any meaningful visitation rights that the prisoner might have.¹⁹⁹ In support of this view is research indicating that

[v]isitation plays such a key role because it prevents prisoners from being "socialized to the life of an inmate [and helps transform them into] individuals who have the necessary skills and

192. Shelden & Teji, *supra* note 189, at 2.

193. *Id.*

194. *Id.*

195. *Id.* at 5, citing RANDALL G. SHELDEN, OUR PUNITIVE SOCIETY (2010).

196. Shelden & Teji, *supra* note 189, at 4.

197. Shymeka L. Hunter, *More Than Just a Private Affair: Is the Practice of Incarcerating Alaska Prisoners in Private Out-of-State Prisons Unconstitutional?*, 17 ALASKA L. REV. 319, 328 (2000)

198. Shelden & Teji, *supra* note 189, at 4.

199. Hunter, *supra* note 197, at 321.

emotional stability to face up to their responsibilities as citizens, parents and spouses.” Moreover, when prisoners are able to maintain contact with family members during incarceration, they are more likely to sustain their relationships after their release. Inmates who have families to support them upon release are less likely to return to a life of crime.²⁰⁰

Bob Weier is a Hawaiian inmate who has served out his prison sentence in Minnesota, Oklahoma, and most recently a private prison in Arizona.²⁰¹ In 2007, a 53-year-old Weier told the *New York Times* that “[y]ou lose your family identity.”²⁰² At the time, Mr. Weier had never met his five grandchildren and had not seen his daughter in eleven years.²⁰³ Of losing his family identity, he added, “that’s not good, because when we go back into society—and more than 95 percent of us will—the only ones who are going to take care of you are your family.”²⁰⁴ Compounding these difficulties, each time Weier was transferred to a different out-of-state prison, “he had to reapply for phone privileges, a process that can take six months. Even when he was allowed to call home, he said, he could not always afford the long-distance bills.”²⁰⁵

Weier is not alone. Hawaii is unique in the extent to which it is involved in the inmate export business. A special 2011 report by University of Hawaii sociologist David Johnson²⁰⁶ revealed that 54 percent of the state prisoners are incarcerated on the mainland.²⁰⁷ The financial reasons for this policy are not as obvious as they may seem. As of the end of 2009, it cost approximately \$118 per day to incarcerate an inmate on the islands, and at least \$62 per day to incarcerate him or her in a private institution on the mainland.²⁰⁸ However, after Hawaiian female inmates were sexually abused in a private institution in Kentucky,²⁰⁹ suspicions on the Islands

200. Hunter, *supra* note 197, at 342, citing Justin Brooks & Kimberly Bahna, “It’s a Family Affair” – *The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 277 (1994).

201. Solomon Moore, *States Export Their Inmates as Prisons Fill*, N.Y. TIMES (July 31, 2007), <http://www.nytimes.com/2007/07/31/us/31prisons.html?pagewanted=all>.

202. *Id.*

203. *States Export Their Inmates*, *supra* note 201.

204. *Id.*

205. *Id.*

206. David Johnson et al., *Hawaii’s Imprisonment Policy and the Performance of Parolees Who Were Incarcerated In-State and on the Mainland*, Department of Sociology University of Hawaii at Manoa & Department of the Attorney General State of Hawaii, Jan. 2011, <http://ag.hawaii.gov/cpja/files/2013/01/AH-UH-Mainland-Prison-Study-2011.pdf> (last visited Sept. 1, 2013).

207. *Id.* at 1.

208. *Id.*

209. Urbina, *supra* note 126.

about cheaper incarceration were aroused, and the report found that the private prison cost assessment was far from being inclusive.²¹⁰ The report found no significant difference in recidivism rates between inmates incarcerated in Hawaii and in the mainland, and the report recommended reassessing the benefits involved in out-of-state incarceration with short-term costs being only one, but not the main, consideration.²¹¹

Arizona is also an important state in the inmate export business, but on the importing side. Inmates from as far as Alaska and Vermont have been shipped to facilities run by Correctional Corporations of America in Arizona.²¹² Simultaneously, Arizona has found itself up against serious overcrowding issues. In an effort to alleviate this problem, Arizona initially looked to house some of its own inmates in private prisons out of state. In 2007, over 2,000 Arizona inmates were being housed in prisons in Indiana and Oklahoma.²¹³

Efforts to place yet more Arizona inmates out of state were often thwarted in favor of private prison corporations putting the bottom line first. For example, Arizona found its overcrowding problem exacerbated when “two private prisons in Texas now run by the GEO Group, canceled Arizona’s contract and instead signed more lucrative deals with federal corrections agencies.”²¹⁴

Unreliability on the part of the private prison companies often led to Arizona officials scrambling to find a place to house its overflow of inmates. In 2010, Arizona announced plans to phase out-of-state beds out of its budget.²¹⁵ This decision came on the heels of a 2005 finding Arizona was paying private contractors “\$11 per prisoner per day *more* than the average daily costs of state-operated prisons, totaling approximately \$4.1 million in extra spending by the state per year.”²¹⁶ In lieu of shipping inmates to private prisons in states such as Oklahoma and Colorado, Arizona has opted to contract with private prison companies to provide more beds in-state to house its prisoners, all the while continuing to take in prisoners from places such as Alaska and Hawaii.²¹⁷ Today, 16% of Arizona’s inmates are housed in private prison facilities, with plans to build

210. Johnson, *supra* note 206, at 33.

211. *Id.* at 2–3.

212. Shelden & Teji, *supra* note 189, at 4.

213. Moore, *supra* note 201.

214. *Id.*

215. *CCA Reports Arizona Budget Proposals to Phase Out Utilization*, BLOOMBERG (Jan. 21, 2010), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ag9tf5eDvLHc>.

216. Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113, 130–31 (2009).

217. Craig Harris, *Arizona Prison Contract Will Go to Private Firm*, ARIZ. REP. (Aug. 26, 2012), <http://www.azcentral.com/news/articles/20120820arizona-prison-expansion-private-firm.html>.

1,000 medium security beds in private facilities on the horizon.²¹⁸

Curiously, this comes at a time when Arizona's prison population is actually in decline for the first time in decades.²¹⁹ Recently, "corrections records show that in fiscal 2011 there were 296 fewer prisoners than the previous year, and this past fiscal year that ended June 30, there were 304 fewer inmates for a total of 38,977."²²⁰ While State Corrections Director Charles Ryan chocked up this decline to "fewer parole revocations, fewer illegal immigrants being placed in state custody and an overall downturn in crime," but nonetheless maintained that more beds were needed, because empty beds currently exist primarily in women's medium-security facilities at which other types of inmates cannot be housed.²²¹ Adversaries to the private prison expansion currently underway in Arizona also look to recent information showing that "the average daily cost per inmate in a state-run, medium-custody facility in 2010 was \$48.42, while the average daily cost for an inmate in a similar private facility was \$53.02. That translates into a 9.5% higher cost per inmate for a private prison."²²²

One particularly robust critique of private prison operations in Arizona stems from concern that there is a lack of oversight as to the out-of-state prisoners that private prison contractors house in Arizona facilities.²²³ While Arizona corrections officials maintain oversight criminals convicted in Arizona and housed in private facilities, Arizona has no say in what kinds of inmates private prisons in Arizona accept from other states or from the federal government.²²⁴ Rather,

[i]n those situations, private-prison operators work with their outside-government partners on training specifications and other operational details. They report to Arizona only the names, security classifications, and number of inmates housed at their facilities. State statutes do not require private operators to provide Arizona officials details about the crimes the prisoners committed or escape data.²²⁵

The lack of oversight by Arizona officials stirred controversy in 2007

218. Harris, *supra* note 217.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. Casey Newton, Ginger Rough & J.J. Hensley, *Arizona Inmate Escape Puts Spotlight on State Private Prisons*, ARIZ. REP. (Aug. 22, 2010), <http://www.azcentral.com/news/articles/2010/08/22/20100822arizona-private-prisons.html>.

224. *Id.*

225. *Id.*

when

two convicted killers sent from another state stole ladders from a maintenance building and climbed onto a roof at a private prison outside Florence. Brandishing a fake gun, they climbed over the prison walls and escaped to freedom. One was caught within hours, but it was almost a month before the other was caught hundreds of miles away in his home state of Washington.²²⁶

Following this incident, a 2008 bill was drafted by then-Governor Janet Napolitano's office that would have required private prisons in Arizona to meet state construction standards.²²⁷ The bill also would have put an end to private prisons allowing murderers, rapists and convicted felons into Arizona from out-of-state, and require private prison companies to share further out-of-state inmate information with Arizona officials.²²⁸ The bill ultimately died.²²⁹

If the number of overall inmates in Arizona is down, and empirical evidence shows that housing inmates in private prisons is more expensive than housing them in state-run facilities, why the continued push for privatization? One answer may lie on the impact that private prisons have on local economies.

A for-profit prison system with questionable oversight is not what a state like Arizona needs, but communities that stand to benefit from the presence of private prisons have been rallying around efforts to expand privatization.²³⁰ In Florence, Arizona, the state's unofficial "prison capital," a public hearing on the issue of private prisons reflected a nearly ubiquitous consensus that such prisons would be welcome.²³¹ At the hearing,

Florence's mayor, town officials and the school superintendent all voiced support for more inmate beds, after they were told by GEO Group that the company's proposal to build a new 1,000-bed prison would create 200 construction jobs, 260 jobs at the facility and a \$12 million annual payroll.²³²

226. Harris, *supra* note 217.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

Added Mayor Tom Rankin, "We are proud of our institutions, and proud to have a much-needed service to the state . . . It will create more jobs, and more jobs mean that more people will shop here."²³³ With a national economy in peril, it appears that the bottom-line appeal of private prisons has the power to extend beyond financial benefits to the corporations themselves and into the communities that they affect.

V. Passing the Buck: Jurisdictional Shifts in Incarceration Pricing the Correctional New Lunch

One way in which corrections officials are seeking to cut costs is by shifting inmate populations from state prisons to county jails. The idea behind doing so is to eliminate the fiscal problem that Franklin Zimring and Gordon Hawkins referred to as the "correctional free lunch": charging and sentencing done on the county level, while the state picks up the tab for incarceration.²³⁴ If, instead, prisons were run locally, and states would allocate money to localities to make incarceration decisions as they saw fit, the costs involved in incarceration would at least be internalized and taken into account when designing policy.²³⁵

The main example of recession-driven jurisdictional shifts is, of course, the California criminal justice realignment, which consists of several complex legislative changes.²³⁶ First, the new legislation identifies hundreds of felonies that are eligible for jail sentences.²³⁷ Second, it shifts the sentencing rules governing nonviolent, nonsexual, nonserious offenders (the "non-non-nons"),²³⁸ not only by transferring their incarceration locus from the state to the county, but also by providing judges with an array of

233. Harris, *supra* note 217.

234. FRANKLIN ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (1991): "The parable of the free lunch is relevant to the discussion of prison population because prisons in the United States are . . . paid for at the state level of government out of state correctional budgets, but prison populations are determined by the number of prisoners referred by local officials and the length of sentences imposed at the local level. Since localities do not contribute to central state correctional budgets, the marginal cost of an extra prisoner may be zero at the local level of government, where the decision to confine is made."

235. W. David Ball, *Defunding State Prisons*, (Jan. 1, 2013) (unpublished manuscript) (on file with Santa Clara Law).

236. See Aaron Rappaport, *Realigning California Corrections*, 25(4) FED. SENT'G REP. 207 (2013), available at <http://www.jstor.org/stable/10.1525/fsr.2013.25.4.207>.

237. *Id.*

238. California Penal Code section 1170(h) amends hundreds of felonies so as to make them punishable by a term in county jail. As opposed to "wobblers," offenses that can be tried as felonies or misdemeanors, these would be felonies, and the only difference is in the physical place of confinement. The Department of State, and the California courts, treats the "non-non-nons" as felons for all other purposes, including felon disenfranchisement. Hadar Aviram & Jessica Willis, *Reintegrating Citizens: Felon Disenfranchisement, Realignment, and the California Constitution*, ST. JOHN'S J. C.R. & ECON. DEV. (forthcoming).

sentencing tools, including “mandatory supervision”²³⁹ and in other programs.²⁴⁰ Third, realignment fundamentally alters parole by shifting the responsibilities for many out-of-prison parolees away from the state and to the counties. In addition, the legislation has required counties to create alternatives to sentencing and reentry programs.²⁴¹ Whether Governor Jerry Brown’s push for realignment was a response to the fiscal crisis, the continuation of efforts at jurisdictional shifts from the Schwarzenegger gubernatorial administration, or an answer to pressure from federal courts to comply with the Supreme Court mandate in *Brown v. Plata*, depends on one’s perspective; lawmakers, lawyers, judges and other stakeholders offer a range of explanations, from a mere saving mechanism to a real change in policy.²⁴²

The jurisdictional shift raises two main problems. First, big variation among counties regarding incarceration and rehabilitation policies, and second, a concern referred to by Margo Schlanger as “the hydra”: shifting dysfunction and abuse from state prisons to county jails. Both problems have already arisen in the context of the realignment.²⁴³

Each of California’s fifty-eight counties has opted for a slightly different policy to address the incoming inmates.²⁴⁴ Research conducted by the Center on Juvenile and Criminal Justice since the Realignment’s implementation reveals the variation in strategies adopted by the different counties. The average number of new prison admissions in 2012, per 1,000 felony arrests, was 90 statewide; Kings County was responsible for 237 admissions per 1,000 felony arrests, and San Francisco County for 25.²⁴⁵ Thirty-two out of the 58 counties, notably Los Angeles, have opted to construct more jails using state funds. Other counties have strived to improve their existing facilities to better serve longer term inmates.²⁴⁶ And other counties have aimed at reducing their reliance on incarceration altogether and finding alternative approaches to sentencing, such as relying

239. CAL. PENAL CODE § 1203.1 (2012).

240. Such as electronic monitoring (sections 1203.017, 1203.018) and programs for women with history of substance abuse (section 1174.4).

241. See Schlanger, *supra* note 10, at 187.

242. *Id.* at 175.

243. *Id.* at 210.

244. Kathryn Jett & Joan Hancock, *Realignment in the Counties*, 25 FED. SENT’G REP. 236 (2013).

245. Mike Males & Lizzie Buchen, *Beyond Realignment: Counties’ Large Disparities in Imprisonment Underlie Ongoing Prison Crisis*, CTR. ON JUV. AND CRIM. JUST., March 2013, at 4, available at http://www.cjcj.org/uploads/cjcj/documents/beyond_realignment_march_2013.pdf (last visited Sept. 3, 2013).

246. Leroy D. Baca & Gerald K. Cooper, *Can AB 109 Work in Los Angeles County?*, 25 FED. SENT’G REP. 241 (2013).

more on the mandatory supervision option.²⁴⁷ The resulting disparities make it difficult to assess the success of realignment as an option, a problem compounded by the difficulty in obtaining data from all 58 counties.²⁴⁸

These varying county approaches are facilitated using subsidies from the state, which brings up the question of fund allocation to the counties. In the early stages of Realignment, funding to the counties was based on the number of parolees returning to them from state prison. This created perverse economic incentives, because counties that were doing a poor job finding alternatives for incarceration were rewarded financially for their poor choices, allowing them to continue making said poor choices. W. David Ball has advocated a system that was adopted later on, which requires allocating funds based on county rates on violent crime, which arguably are a better representation of a given county's incarceration needs.²⁴⁹

The second concern has to do with the "hydra" problem: Shifting inmates from state prisons to county jails may reproduce the problematic incarceration conditions in the local settings. This becomes a serious issue when considering that jail conditions, in themselves, were not necessarily better than state prison conditions before the realignment.²⁵⁰ And, indeed, the fierce litigation over health care in prisons, which produced the Supreme Court decision in *Brown v. Plata*, is now echoed by emerging litigation against county jails with similarly abysmal health care. One such case is the Riverside Jail, mentioned above for its new policy of charging its inmates \$140 per night.²⁵¹ The hotel-scale fee becomes even more absurd when considering current conditions—triple-stacked bunk beds to handle the flow of inmates, a months-long wait for the jail's 4,000 inmates before seeing a doctor, cursory exams and inadequate follow-up.²⁵²

The realignment may, indeed, be the biggest experiment in

247. Callie Shanafelt, *Alameda Probation Chief Sees Opportunity in Prison Reform*, CAL. HEALTH REP. (Aug. 30, 2011), <http://www.healthycal.org/archives/5559> (last visited Oct. 13, 2013).

248. Mona Lynch, *Realigning Research: A Proposed (Partial) Agenda for Sociolegal Scholars*, 25(4) FED. SENT'G REP. 1 (2013).

249. W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates – And Why It Should*, 28 GA. ST. U. L. REV. 987, 1075 (2012).

250. Indeed, some of the more atrocious conditions that yielded federal litigation were in county jails. See MALCOLM FEELEY AND EDWARD RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (2000).

251. *Riverside among California Counties Facing Inmate Lawsuits after State Prison Realignment*, KPCC (Mar. 19, 2013), www.scpr.org/news/2013/03/19/36435/ca-counties-now-facing-inmate-lawsuits-after-state/ (last visited Sept. 3, 2013).

252. *Id.*

jurisdictional shifting, but it is far from being the only one. In Florida, “a current proposal on the table . . . could shift about 5,600 inmates from state prisons to county jails.”²⁵³ With 20% of county jails in Florida already over capacity, critics of the proposal suggest that instituting a realignment policy similar to that in California merely shifts the burden of improving the prison system from the state to the counties.²⁵⁴ Proponents of the proposal, however, counter that transferring inmates to county jails will alleviate a financial burden by saving the state \$47.7 million per year.²⁵⁵ While transferring inmates from the state to the counties entails financial incentives for the state, the move would likely cost the counties \$100 million—over twice as much as the state would save.²⁵⁶ The way that the proposed shift would be implemented is as follows,

Today, anyone sentenced to more than a year behind bars is sent to a state prison, with credit for “time served” in a local jail while awaiting trial and sentencing. Under the proposal, if this “time served” credit knocks the remainder of the sentence down to less than a year, the inmate would remain in the jail for the duration of the sentence.²⁵⁷

The Association of Counties is gearing up to try and combat the proposal, which would require a change in state sentencing laws. Concern over the proposal’s passage stems from the fact that, “for counties, which have been forced to make cut spending [sic] over the last few years because of falling property-tax revenues, the extra financial burden would create budget havoc. Some aren’t even sure where they’d put extra inmates.”²⁵⁸

Conclusion

Some developments in criminal justice policy, such as the increasing number of states to abolish the death penalty or decriminalize marijuana, would lead us to the conclusion that the financial crisis has had a salutary effect on the American correctional landscape. And, indeed, those big changes are, in large part, the silver lining of the crisis, which has made

253. *Will Florida Follow in California's Path?*, CORRECTIONAL NEWS (Dec. 12, 2012), <http://www.correctionalnews.com/articles/2012/12/12/will-florida-follow-in-california-s-path>.

254. Kathleen Haughney, *Counties Fear \$100M Cost of State Cost-Cutting Proposal*, THE SUN SENTINEL (Dec. 3, 2012), http://articles.sun-sentinel.com/2012-12-03/news/fl-state-puts-pressure-county-jails-20121202-26_1_county-jails-stockade-facility-extra-inmates.

255. *Id.*

256. *Id.*

257. *Counties Fear \$100M Cost*, *supra* note 254.

258. *Id.*

mass incarceration, if not less palatable, at least economically unsustainable. But those shifts and changes are only part of a complicated picture, as the examples in this paper demonstrate. The myriad techniques and practices that states and localities have adopted to save money on corrections in a time of austerity—privatization, out-of-state incarceration, prison closures, bartering with other states, jurisdictional shifts—reveal a society that has not come to the conclusion that it is time for the punitive pendulum to swing in the other direction. We are not quite ready to “exit Nixonland policy-wise, but since we cannot afford to sentence and,”²⁵⁹ incarcerate at the same scale, these changes resemble emergency measures more than they resemble well-thought penal reform efforts.

It is also important to keep the overall decline in state prison populations in perspective. Despite the decline 25 states, as well as the federal government, had stable or increasing prison populations as late as 2010.²⁶⁰

Why, then, has the financial crisis been successful in fueling the political struggle to abolish the death penalty and legalize marijuana, and so unsuccessful in creating long-lasting correctional policies? The answer is, I believe, complicated. First, the common feature of abolition and marijuana legalization is their high political profile, which means that educating the public about the costs of public choice in these issues can be successful, provided that the campaign is authentic, persuasive, and that reform would not negatively affect public safety. Issues of overcrowding, budgeting and incarceration options tend to be polycentric questions with many moving parts,²⁶¹ which are far less easy to settle, whether in a polarized legislature or in a referendum in a neopopulist state.²⁶² Since resolving prison overcrowding is a complex task, which cannot be answered by a yes/no vote from the public, the maneuvers this paper describes take place behind closed doors, in negotiation settings between prison administrators and private service providers.

These providers are the second important factor. The existence of strong economic interests to preserve and increase mass incarceration acts as a counterweight to the need to create policies that better fit economically lean times. It is difficult for states to pare down their prisons when they are

259. Term borrowed from Jonathan Simon's blog GOVERNING THROUGH CRIME, <http://governingthroughcrime.blogspot.com/> (last visited Oct. 27, 2013).

260. Porter, *supra* note 163, at 5.

261. Granted, legalization and abolition are not, of course, yes/no questions, as they require considerable regulation to take effect, but these flow better from a yes/no determination whether the current policy should stay in place.

262. For the effects of neopopulism on decision-making in matters of punitiveness see VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* (2009).

tied up in contractual obligations with private providers and with other states to provide space, inmates, or both. The Arizona example, discussed in this article in depth, is particularly important; returning to the “tough ‘n’ cheap” days of early penal policies may not be a realistic expectation, but the strong partnership with CCA and other private elements is yielding a postmodern version of “tough ‘n’ efficient.”

Of course, the question is whether overcrowding inmates in private institutions, shipping them away from their families, and shifting them out of state institutions and into county jails is “efficient” in terms of recidivism reduction. And that is a third important factor: Austere times do not yield themselves easily to long-term planning that may require expenditures on prison rehabilitation programs and reentry schemes. The temptation to cut costs in the short term until the economy improves is understandable, but without a significant shift toward rehabilitation and true hope for recidivism reduction it is unlikely to yield results that will please us when the economy improves.

The lesson to be learned from these policies is that, while costs are a powerful motivator behind policy changes, they cannot achieve everlasting positive reform without keeping the more fundamental arguments about human dignity, hope, and belief in change, on the table. Let us hope these don’t get lost when the recession comes to an end.
